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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 837

CHAS. C. STEWARD MACHINE COMPANY,
Petitioner,

v.

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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Respondent.

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Circuit Court of Appeals has not been reported. It is contained in the record (p. 27).

JURISDICTION

The judgment of affirmance below was rendered on March 20, 1937 (R.33). Petition for writ for certiorari was filed March 22, and was granted March 29, 1937. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended (44 Stat. 938).

QUESTION PRESENTED

Does the action of Congress in undertaking to impose taxes by TITLE IX of the Social Security Act (49 Stat. 620, 639) upon the petitioner constitute a valid exercise of the powers of Congress under the Constitution?

STATUTES INVOLVED

TITLES III, VII and IX of the Social Security Act (herein called the Federal Act) are necessarily involved in the determination of the validity of the taxes sought to be recovered by the petitioner. An analysis of these TITLES is found on pp 9-13 herein.

STATEMENT

The petitioner, an Alabama corporation with its principal place of business at Birmingham, Alabama, having paid a tax of $46.14 imposed on it by Section 901 of the Federal Act for the period from January 1 to December 31, 1936, filed with respondent his claim for refund (R. 9) which the Commissioner of Internal Revenue denied (R. 12). Petitioner then filed its bill of complaint in the District Court (R. 1) claiming of the Collector of Internal Revenue for the collection district of Alabama the sum of $46.14, which the petitioner had so paid. In its complaint petitioner averred that the Federal Act is unconstitutional and invalid, and that the tax was wrongfully and illegally assessed and collected by the respondent for the following reasons:

1. The plan and scheme set up by Congress in the Federal Act has for its purpose and effect the enactment of unemployment compensation laws by the states, which are not the voluntary acts of the governments of the states, but

which are brought about by the coercion and compulsion of the Federal Act.

2. Such plan and scheme violate the 9th and 10th Amendments to the Constitution of the United States in that Congress, through the Federal Act, undertakes to set up a Federal system of unemployment compensation in order to engage in the regulation of matters with which it is not concerned under the Constitution and which are wholly within the power and jurisdiction of the states to regulate. Under such plan and scheme the states surrender control of the monies collected from their citizens and attempt to surrender to the United States effectual control of the construction, operation and methods of administration of the laws of the states.

3. Under the pretext of exercising its powers, Congress, by the Federal Act, undertakes to effecuate an end which is inconsistent with the limited grants of power to Congress in order to bring about a system of unemployment compensation, which is a matter reserved to the states or to the people thereof.

4. Under the system created by the Federal Act and the state acts enacted under the coercion thereof, the property of petitioner and other employers is taken for the benefit of an arbitrarily defined class without the payment of just compensation to petitioner and such other employers.

5. The taxes imposed under the Federal Act are not taxes creating revenue for the support of the Government in the accomplishment of its constitutional purposes, but are imposed for the purpose of providing funds for disbursement in the administration of state laws relating to matters beyond the control of Congress and which the Federal Act

coerces and compels the states and the people thereof to enact.

6. The Federal Act violates Article I, Section 1, of the Constitution in that it attempts to vest in the Social Security Board power to determine what sums shall be paid out of the Treasury of the United States for the administration of state unemployment compensation laws without fixing any legal standards whereby the amounts to be paid to any state can be determined except by the exercise of discretion legislative in character and extent.

The respondent demurred to the petitioner's complaint (R. 13), setting up the validity of the tax complained of. The District Court sustained the petitioner's demurrers and dismissed the cause (R. 16). Petitioner appealed to the Circuit Court of Appeals, and that Court on March 20, 1937 affirmed the judgment of the District Court (R. 33).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the taxes imposed by TITLE IX constitute a valid exercise of the taxing power of Congress.

(2) In affirming the judgment of the District Court.

The petitioner also urges that the Circuit Court of Appeals further erred in holding:

(3) That TITLE IX is complete in itself and is separable from the remainder of the Act.

(4) That the appropriation of $49,000,000 in TITLE III does not correspond with the tax raised under TITLE IX so as to justify the Court in regarding the two as vitally joined in spite of the separability section (Section 1103).

(5) That if the Social Security Board and its function (fixed under TITLE VII) be unconstitutional, the immediate effect would be to render the credit impossible and leave the full tax to be collected.

(6) That the tax and credit scheme has been devised by Congress for the purpose (a) of refilling the treasury (in respect to the recent expenditure by the United States of several billion dollars for relief, the primary duty and burden of which rests on the several states) and (b) of encouraging the states to assume for the future their proper burden.

(7) That there is in the Federal Act no undue coercion or compulsion on the state.

(8) That while the subject of unemployment is admittedly a matter primarily for the states, the recent experience of the federal treasury in providing relief funds is also involved, and the reasonable protection of the treasury is part of the general welfare in a constitutional sense, as a result of which grants are justified to aid state agencies (under TITLE III) whose operation will tend to protect the federal treasury.

(9) That the tax is calculated to raise more money than is appropriated to aid state administrations even if all the states establish them, and the net result of it will be to put money into the federal treasury as well as to aid federally protective state activities.

(10) That the credit is not a penalty or coercion on the taxpayer.

(11) That the imposition of the tax on employers of eight or more does not deny due process or take property without just compensation.

SUMMARY OF ARGUMENT

The Federal Act is so lacking in precedent that our argument is to a large extent devoted to the history of the legislation in order to show that Congress seized on the taxing power merely as a pretext to provide this plan for unemployment. In the history of the Act, from its inception in the President's message to its final passage, there are no important questions overlooked. The measure does not contain ten titles without a purpose; it was to force the exploration of new fields along with the old; to prevent the defeat of new measures at the hands of Congress which they may have suffered if not propped up by grants for the blind, for crippled children, for public health.

TITLES III and IX were for the purpose of taking care of the unemployed "through no fault of their own"; of providing for the man who had lost his job without requiring the means test; of maintaining wage levels; of bringing about an equitable distribution of income; of stimulating a more intelligent stabilization of industry and of providing more security for the workers.

This is no mean undertaking. But from what source does the Federal Government derive the power it now assumes? Who is to provide this security for the worker? The Government? No. The public generally? No. The employer is to carry the burden. The benefit he derives is the opportunity to select his labor from the newly created pool which exists on cash benefits. It is true that the employer has to a greater or less degree never lacked this opportunity before; now it costs him $200,000,000 the first year and $900,000,000 the third year.

The plan itself is ingenious admittedly. Congress lacks the power to establish the complete system of contribution and

benefits. Sadly, the proponents of the measure faced that reality. A prior senate committee in 1932 had held such an undertaking unconstitutional (Senator Wagner dissenting). Now some "device" must be found which will skirt the courts. The states must be "stimulated" to provide their part of the system. The costs of doing business in all the states must be equalized. Competition among the states must be levelled. The tax-credit device is the plan. If the state is recalcitrant, its employers pay their taxes anyhow, and they are spent in other states. If the states follow (as forty-two have) they may keep ninety per cent of the tax. The remaining ten per cent. is necessary for administration of the system from Washington.

Singularly enough, if the measure succeeds in raising revenue for the treasury, it fails in its purposes! For that means that the states do not bend under the federal yoke. How can this be done within the limits of federal power was the question that constantly arose, a ghostly visitor at the committee table. Separate the two acts; put the spending part in a different dress from the taxing feature. Remove it from attack. Lessons are to be learned from experience. The case of *United States v. Butler*[1] had been decided by the District Court in Boston on October 19, 1934 and gave some support to the proponents of the measure. The committees were hearing witnesses from January 21 to February 20, 1935. *Panama Refining Co. v. Ryan*[2] had been decided on January 7. The report of the Committee on Ways and Means was made on April 5. Its timidity in support of the constitutionality of the measure was marked. The House passed the bill on April 19. The case of *Railroad Retirement Board v. Alton*[3] had been decided on May 6. The Senate Committee

1 297 U. S. 180 L. ed. 477)
2 293 U. S. 388 (79 L. ed 446)
3 295 U. S. 330 (79 L. ed. 1468)

reported the bill out with amendments on May 20. Before it came on for debate in the Senate *Schechter Poultry Corporation v. United States*[1] was announced on May 27. These decisions should have carried the lesson of constitutionality, but they failed to do so.

As a device the two-way system was adopted. No one could raise the validity of the tax. No one could question an appropriation. The tax club was sufficient to drive the states into line. The few standards surrounding the grants would be sufficient to assure control of the system. If the Federal Act should be held unconstitutional the state acts would continue to operate. So the federal-state system was launched in preference to the national system, in which the federal government would administer the entire plan, and in preference to the subsidy plan, in which the government collects all the taxes and subsidizes the states.

Indeed, argued the proponents of the measure, the Court cannot look into the motive of Congress, provided the power exercised be constitutional. And certainly, the imposition of an excise tax is constitutional. But here the motive is not concealed. The Court is not required to seek it. It stands out, starkly revealing the taxing power as a mere pretext.

We contend further that the provisions of TITLES III and IX have not only no reasonable relationship to the taxing power, but no relationship at all; that the Act is not severable, for it is plain that without the system of unemployment Congress would not have enacted the measure.

Pursuing the Act from its beginning through the lengthy hearings and the debates in Congress, one can come to but one conclusion: That Congress stepped beyond its sphere and in

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1 295 U. S. 495 (79 L. E. 1570)

the most far-reaching measure it has ever enacted, undertook to assume control of activities of the states fundamental in their character.

If Congress has this power, no longer may a clash of sovereignties ring out. The states will have lost their powers and one supreme government will regulate their affairs from Washington.

ARGUMENT

I

Analysis of TITLES III, VII and IX of the Federal Act

In framing the Federal Act Congress undertook to separate the taxing provisions from the regulatory provisions, with the expressed hope[1] that this Court would consider them separately, as a result of which the possibility of their being held void would be enhanced. It is therefore the view of the petitioner that the Court must consider, not only the taxing sections of the act, but all related provisions. These are found in TITLES III, VII and IX. The Court is not required to explore to find the motive of Congress in enacting the legislation. Such a motive and purpose stand out boldly in its written provisions.

TITLE III of the Act authorizes an appropriation of $49,000,000 annually for the purpose of assisting the states in the administration of their unemployment compensation laws. The basis on which the Social Security Board determines the amount to be paid to each state is (1) the popula-

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[1] Infra, pp. 79, 80, 86, 88.

tion of the state, (2) an estimate of the number of persons covered by the state law and of the cost of proper administration of such law, and (3) such other factors as the Board finds relevent. [302 (a)].

The Board is forbidden to certify payments to any state until it finds that the law of such state includes provisions for (a) such methods of administration (other than as to selection, tenure of office, and compensation of personnel) as the Board finds to be reasonably calculated to insure full payment of unemployment compensation when due; (b) payment of unemployment compensation solely through such agencies as the Board may approve; (c) opportunity for a fair hearing for all individuals whose claims for unemployment compensation are denied; (d) the immediate payment of all contributions exacted by the state, to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by the Federal Act, and the expenditure of all money requisitioned by the state from this Trust Fund, in the payment of unemployment compensation only; (e) the making of such reports, in such form and containing such information, as the Board may from time to time require, and compliance with such provisions as the Board may find necessary to assure the correctness and verification of such reports; (f) making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, certain detailed information relating to the status of each recipient of unemployment compensation, with a statement of such recipient's right to further compensation under such law [303 (a)].

The Board is authorized to terminate payments to any state upon a finding that there is (g) a denial by the state agency in a substantial number of cases of unemployment

compensation to individuals entitled thereto under the law, or (h) a failure of substantial compliance with any of the provisions contained in (a) to (f) of the next preceding paragraph. [303 (b)].

TITLE VII of the Act establishes the Social Security Board, imposes on it the duties provided by the Act and also the duty of studying and making recommendations as to legislation and matters of administrative policy concerning unemployment compensation and related subjects.

Under TITLE IX of the Act taxes are imposed on employers amounting to 1 per cent. during 1936, 2 per cent. during 1937 and 3 per cent. thereafter. (901). Against this tax the employer may credit the amount of contributions paid by him into an unemployment fund under a state law, such credits not to exceed 90 per cent. of the federal tax and to be allowed only for contributions made under the laws which shall have been approved by the Board. (902).

The Board is required to approve any state law which provides, among other things, that (a) all compensation is to be paid through such public agencies as the Board may approve; (b) no compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required; (c) all money received by the state is to be immediately paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund, and all money withdrawn from this fund is to be used solely in the payment of compensation, exclusive of expenses of administration; (d) compensation shall not be denied by the state to any otherwise eligible individual for refusing to accept new work (1) if the position offered is vacant due directly to a strike, lock-out or other labor dispute, (2) if the wages,

hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality, or (3) if as a condition of being employed the individual would be required to join a company union or to resign or refrain from joining any bona fide labor organization; (e) the legislature has the right at any time to amend or repeal the state law without reservation of any rights, privileges or immunities conferred by such law. [903 (a)]. The Board is authorized on December 31 in each taxable year and after notice and opportunity for hearing to disapprove the law of any state which it shall have theretofore approved, and thus deprive the employer of the 90 per cent. credit otherwise afforded him under the Federal Act, if the Board finds that such law no longer contains the provisions specified under (a) to (e) of this paragraph or has with respect to such taxable year failed to comply substantially with any of such provisions. [903 (b)].

The Unemployment Trust Fund is established in the Treasury and all states are required to deposit all contributions in such fund. The Secretary is directed to administer the fund and is authorized to purchase United States bonds on the market. The purposes for which obligations of the government may be issued under the Second Liberty Bond Act are extended to authorize the issuance of special obligations exclusively to the fund, the interest rate of which shall be equal to the average rate of interest borne by all interest bearing obligations forming part of the public debt. Such special obligations may be redeemed at par plus accrued interest and the Secretary may sell any obligations acquired by the fund. The fund shall be invested as a single fund but the Secretary shall maintain a separate book account for each state agency. He is directed to pay to any state agency such amount as the latter may duly requisition, not exceed-

ing the amount standing to its account at the time of such payment.

This TITLE contains a list of definitions including employer, wages, state agency, employment fund and contributions. "Employment" means any service performed within the United States by an employee for his employer except (a) agricultural labor; (b) domestic service in a private home; (c) service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; (d) service performed by an individual in the employ of certain members of his immediate family; (e) service in the employ of the United States Government; (f) service in the employ of a state or of its political subdivisions; (g) service performed in the employ of a corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. (907).

II

The Court May Give Consideration to the Deliberations of Legislative Bodies

What is the purpose of the TITLES of the Act under attack? The only power under the Constitution which appears on the face of the Act and which Congress is authorized to exercise is the taxing power. But the purpose of the Act appears on its face to be, not to raise revenue, but to bring about a condition of social security so that, among other things, unemployment will be lessened if not ended. Is this purpose valid? Is this use by Congress of the taxing power a pretext to accomplish an object which is beyond the con-

stitutional power of Congress? In ascertaining the purpose of the Act the court

> "is at liberty to advert to the view expressed by individual members in debate, or by a committee in its report, and gather therefrom as from any other source the history of the times or of the evil which the legislation was intended to remedy. . . . "
>
> 25 R. C. L. 1037, Section 270.

In United States v. Union Pacific Railroad Company (1875), 91 U. S. 72 (23 L. ed. 224), the court said that

> "courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." (citing cases) [1] 79 (228).

Joseph R. Binns v. United States (1904), 194 U. S. 486 (48 L. ed. 1087), was a case involving license fees on certain kinds of business in Alaska. The court considered

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[1] See also *American Net and Twine Company v. Roland Worthington* (1891), 141 U. S. 468, 473-4 (35 L. ed. 824); *Church of the Holy Trinity v. United States* (1892), 143 U. S. 457, 465 (36 L. ed. 226, 230); *Standard Oil Company of New Jersey v. United States* (1910), 221 U. S. 1, 50 (55 L. ed. 619, 641); *United States v. Forty Barrels* (1916), 241 U. S. 265, 281-3 (60 L. ed. 995, 1002-3); *Duplex Printing Press Co. v. Emil J. Deering* (1921), 254 U. S. 443, 474-5, 477 (65 L. ed. 349, 360, 361); *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.* (1922), 257 U. S. 563, 588-9 (66 L. ed. 371, 383); *United States of America, et al. v. Missouri Pacific Railroad Company* (1928), 278 U. S. 269, 278-9 (73 L. ed. 322, 376-7); *Federal Trade Commission v. Raladam Company* (1931), 283 U. S. 643, 650-1 (75 L. ed. 1324, 1330-1); *Atlantic Cleaners & Dyers, Inc., Globe Dry Cleaners & Dyers, Arcada-Sunshine Company, et al., v. United States of America* (1932), 286 U. S. 427, 435 (76 L. ed. 1204, 1208); *United States v. Shreveport Grain & Elevator Co.* (1932), 287 U. S. 77, 83 (77 L. ed. 175, 178); *Humphrey v. United States* (1935), 295 U. S. 602, 624-6 (79 L. ed. 1611, 1617-18).

the investigation made by the committee reporting the bill to Congress, saying that the committee prepared the list of licenses

> "after consultation with prominent citizens of the territory of Alaska, including the governor and several other officers, . . ." 495-6 (1091)

In *United States v. St. Paul, Minneapolis & Manitoba Railway Company, et al.* (1918), 247 U. S. 310 (62 L. ed. 1130), involving a suit by the United States to annul a patent to lands on the ground of fraud and mistake, the court considered a special message of the President explaining the magnitude of the work of adjustment arising out of railroad land grants and recommending an amendment to be enacted by Congress applicable to such a situation, and to the fact that the Committee to which the President's message was referred did not accede to the recommendation contained therein. [316 (1133)].

While no ambiguity exists in the Act and while by its plain terms its purpose is beyond the powers of Congress, the court may go further in support of the theory that the use of the taxing power is a pretext. In *United States v. Great Northern Railway Company* (1932), 287 U. S. 144 (77 L. ed. 223), the court referred to the rule that in aid of construction of a statute if the meaning be uncertain, the court has recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by Congress. It stated [154 (230)] that in construing the act in question the court had not traveled beyond the borders of the statute; but that

> " . . . If such recourse be had, there is confirmation of the view that the certificates were more than estimates of provisional advances." 155 (230)

and proceeded to consider the progress of the statute through Congress.

In showing such use of the taxing power to be a mere pretext we shall have recourse to the following:

(1) Messages of the President of June 8, 1934, and January 4, 1935;

(2) Message of the President of January 17, 1935 transmitting the Report of the Committee on Economic Security theretofore created by the President by executive order and recommending legislation on the subject of Economic Security;

(3) The Report of the Committee on Economic Security;

(4) The introduction in both houses of the Wagner-Lewis bill;

(5) The hearings on the Wagner-Lewis bill before the Ways and Means Committee of the House and the Committee on Finance of the Senate;

(6) The reports of the House and Senate Committees recommending the passage of the bill;

(7) The debates in Congress on the passage of the bill.

We use the following excerpts from the statements of the witnesses before the Committees, not to indicate the view of the individual, but to show that the testimony before the Committees indicated without exception that the purpose of the bill was to avoid the evils of unemployment which the history of the times showed was so disastrous. If this thought and purpose run throughout the entire history of the consideration of that subject—the Messages of the President, the

Report of the Committee on Economic Security, the Hearings before the Committees, and the Debates in Congress,—it must result that the plain purpose of the bill was not to raise taxes; that the use of the taxing power by Congress is a mere pretext to accomplish an object beyond the powers of Congress. The purported tax loses its qualities as a tax, becomes a mere penalty to force the states to carry out the plan and scheme of Congress, and is invalid.

In explanation of the extent to which we feel impelled to go in submitting this history to the Court, we have only to say that the hearings before the Committees occupy 2,492 pages and the debates in Congress extend over a period of nine days in the House and six days in the Senate, with consideration being given the measure at other times and during its several stages; the debates in the house being found in the Cong. Rec., Vol. 79, Part 5, beginning at page 5454 and ending at page 6070; and in the Senate in Part 9, beginning at page 9267 and ending at page 9650.

(1) History and Evils of the Times and General Purposes of the Legislation

(a). Messages of the President

In his message to Congress on June 8, 1934 (Cong. Rec. Vol. 78, Pt. 10, p. 10770) the President set out that the first objective in the task of reconstruction was " . . . the security of the men, women, and children of the nation . . . "; that this security for the individual and for the family concerns itself primarily with three factors.

> " . . . . People want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safeguard against misfortunes

which cannot be wholly eliminated in this man-made world of ours." (Ib.)

The President referred to the custom in the earlier days when security was attained through the interdependence of members of families upon each other and of the families within a small community upon each other; but that the complexities of great communities and of organized industry

> "make less real these simple means of security. Therefore, we are compelled to employ the active interest of the Nation as a whole through government in order to encourage a greater security for each individual who composes it. (Ib.)

* * * * *

> "The third factor relates to security against the hazards and vicissitudes of life. Fear and worry based on unknown danger contribute to social unrest and economic demoralization. If, as our Constitution tells us, our Federal Government was established, among other things, 'to promote the general welfare', it is our plain duty to provide for that security upon which welfare depends. (Ib.)
>
> "Next winter we may well undertake the great task of furthering the security of the citizen and his family through social insurance. (Ib. p. 10771)

* * * * *

> "These three great objectives—the security of the home, the security of livelihood, and the security of social insurance—are, it seems to me, a minimum of the promise that we can offer to the American people. They constitute a right which belongs to every individual and every family willing to work. They are the essential fulfillment of measures already taken toward relief, recovery, and reconstruction.

"This seeking for a greater measure of welfare and happiness does not indicate a change in values. It is rather a return to values lost in the cause of our economic development and expansion.

"We must dedicate ourselves anew to a recovery of the old and sacred possessive rights for which mankind has constantly struggled—homes, livelihood, and individual security. The road to these values is the way of progress. Neither you nor I will rest content until we have done our utmost to move further on that road." (Ib.)

In his message upon the convening of Congress, January 4, 1935, the President referred to his message of June 8, 1934, stating that a comprehensive survey of what had been attempted or accomplished in many nations and in many states on the subject of security proved to the President that the time had come for action by the national government; that he would send to Congress in a few days definite recommendations based on these studies, covering, among others, the broad subjects of unemployment insurance and old age insurance. (Cong. Rec. Vol. 79, Pt. 1, p. 95).

Accompanying his message of January 17, 1935 the President submitted to Congress the Report of the Committee on Economic Security which he had created. He referred to the fact that most of the other advanced countries of the world have adopted social insurance, and that their experience affords the knowledge that it can be made a sound and workable project (Ib. p. 598). He strongly recommended action to attain the objectives sought in the report submitted, referred to his promise in his annual message to submit a definite program of action, which he now does in the form of a report to him by a Committee on Economic Security, appointed by him for the purpose of surveying the field and of recommending the basis of legislation. (Ib.)

"The detailed report of the committee sets forth a series of proposals that will appeal to the sound sense of the American people. It has not attempted the impossible, nor has it failed to exercise sound caution and consideration of all the factors concerned; the national credit, the rights and responsibilities of States, the capacity of industry to assume financial responsibilities, and the fundamental necessity of proceeding in a manner that will merit the enthusiastic support of citizens of all sorts." (Ib.)

(b). Report of the Committee on Economic Security

In his message of January 17, 1935, the President said that he was

"gratified with the work of this committee (on Economic Security) and of those who have helped it: The Technical Board on Economic Security, drawn from various departments of the Government; the Advisory Council on Economic Security, consisting of informed and public-spirited private citizens and a number of other advisory groups, including a Committee on Actuarial Consultants, a Medical Advisory Board, a Dental Advisory Committee, a Hospital Advisory Committee, a Public Health Advisory Committee, a Child Welfare Committee, and an Advisory Committee on Employment Relief. All of those who participated in this notable task of planning this major legislative proposal are ready and willing, at any time, to consult with and assist in any way the appropriate congressional committees and Members with respect to detailed aspects." (Cong. Rec., Vol. 79, Pt. 1, p. 598)

In its report, signed by the Secretaries of Labor, Agriculture and the Treasury, by the Attorney General and the Federal Emergency Relief Administrator, the Committee on Economic Security said:

"In our economic system the great majority of the workers must find work in private industry if they are to have permanent work. The stimulation and maintenance of a high level of private employment should be a major objective of the Government. All measures designed to relieve unemployment should be calculated to promote private employment and also to get the unemployed back into the main channel of production. We believe that provision of public employment in combination with unemployment compensation will most effectively serve these purposes. Both will operate to maintain purchasing power, and public employment will indirectly give work to many more persons in private industry who otherwise would have none. At the same time it will stimulate workers to accept and seek private employment when it becomes available. (Report to the President of the Committee on Economic Security, p. 8)

* * * * *

"*Individual industry and company accounts.*—The primary purpose of unemployment compensation is to socialize the losses resulting from unemployment, but it should also serve the purpose of decreasing rather than increasing unemployment. . . . (Ib. p. 22)

* * * * *

" . . . . Normally the insured worker will return to his old job or find other work before his right to benefits is exhausted. If he does not find work, we recommend that his further period of unemployment should be met by a work benefit, as described in the section of this report dealing with employment assurance . . . " (Ib. p. 14)

(c). Hearings Before the Committees on Ways and Means of the House of Representatives and on Finance of the Senate

There was a total of one hundred and eighty-four appearances made before or statements submitted to the Committees on Ways and Means of the House and on Finance of the Senate. It is interesting to note the classes into which they may be divided.* These are, with the number of appearances in each class, as follows:

		Number of Witnesses Appearing
1.	Business Associations and Organizations	23
2.	Economic Research Institutions and Societies	5
3.	Governmental Agencies and Departments	24
4.	Health Agencies and Societies	12
5.	Individuals Unclassified	21
6.	Labor Interests	12
7.	Miscellaneous Societies and Associations of Particular Classes	12
8.	National Women's Associations	5
9.	Religious Societies	5
10.	Representatives and Senators	13

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*CLASSIFICATION OF APPEARANCES MADE AND STATEMENTS PRESENTED BEFORE THE HOUSE COMMITTEE ON WAYS AND MEANS AND THE SENATE COMMITTEE ON FINANCE ON THE HEARINGS ON THE ECONOMIC SECURITY ACT

1.

Business Associations and Organizations

C. D. Cass[1]—American Transit Association[2]
George B. Chandler—Ohio Chamber of Commerce[3]
James L. Donnelly—Illinois Manufacturers Association[2]

(1) The witness represents or is connected with the organization, department or office appearing after his name.
(2) Appeared before House Committee.
(3) Appeared before Senate Committee.

		Number of Witnesses Appearing
11.	Societies and Associations Interested in the Blind	4
12.	Societies and Associations Interested in Welfare of Children	4
13.	Societies Interested in the Betterment of Social and Living Conditions	10
14.	State Agencies	20
15.	Universities, Schools and Related Subjects	14

The hearings are closely and intimately connected with the reports of the Committees and the debates in Congress; for it was in committee room that the discussions first arose on which the reports are based and which were brought to and repeated on the floor of the House and Senate.

Mr. Treadway, a member of the Ways and Means Committee, referred on the floor of the House to the fact that there was little testimony before that committee from persons of experience in business lines; that practically everybody who appeared had some part in drafting the legislation or was consulted with respect to the problems involved; that

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Business Associations and Organizations (Cont'd.)

James A. Emery—National Association of Manufacturers[4]
Lincoln Filene—William Filene's Sons Co.[3]
H. Walter Forster—Vice President of the Pension Casualty Division, Towers, Perrin, Forster & Crosby, Inc.[4]
John C. Gall—National Association of Manufacturers[3]
Henry I. Harriman—United States Chamber of Commerce[3]
John Harrington—Illinois Manufacturing Association[3]
Elon H. Hooker—Manufacturing Chemists Association[3]
Albert D. Hutzler—Vice Chairman National Retail Dry Goods Association[4]
J. P. Kerr—Association of Drainage and Levee Districts of Illinois[2]
J. F. Kolb—National Metal Trades Association[3]

(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before House and Senate Committees.

there were not in excess of half a dozen persons who testified who were not a part of the "present new-deal administration." (Cong. Rec. Vol. 79, Pt. 5, p. 5528)

Business Associations and Organizations (Cont'd.)

Stanley Latshaw—National Publishers Association[3]
L. C. Morrow—National Publishers Association[3]
Lloyd A. Peck—Laundryowners' National Association[3]
Samuel W. Reyburn—National Retail Dry Goods Association[4]
Noel Sargent—National Association of Manufacturers[3]
W. A. Snow—Associated General Contractors of America[3]
Harold W. Story—Vice President and General Counsel, Allis-Chalmers Manufacturing Company[3]
U. S. Engineers, Inc.—New York City[3]
Wm. R. Webster—Connecticut Manufacturers Association[3]
W. R. Williamson—Travelers Insurance Company[2]

2.

Economic Research Institutions and Societies

Dr. Robert R. Doane—Director of Research, American Business Surveys[4]
Henry E. Jackson—President, Social Engineering Institute[3]
E. W. Mason—Progressive Study Club[2]
Dr. Harold G. Moulton—Brookings Institution[2]
George Shibley—Director, The Research Institute[3]

3

Governmental Agencies and Departments

Miss Grace Abbot—Member Advisory Council on Economic Security[4]
Dr. Fred L. Adair—Advisory Committee on Child Welfare[2]
A. Altmeyer, Jr.—Second Assistant Secretary, Department of Labor[2]
Hon. Hugh S. Cumming—Surgeon General, U. S. Public Health Service[4]
Robert G. Elbert—Member Unemployment Insurance Committee to the Industrial Advisory Board[3]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

(d). Hearings Before the Committee on Ways and Means of the House

The general purposes of the bill are indicated by the statements of the following named witnesses:

Murray Latimer, Chairman, Railroad Retirement Board, discussing the fundamental difference between old-age insurance and unemployment compensation lamented the fact

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Governmental Agencies and Departments (Cont'd.)

Dr. I. S. Falk—Member of the Staff of the Committee on Economic Security[3]
M. B. Folson—Member Advisory Committee on Economic Security[4]
Frank P. Graham—Chairman Advisory Council[4]
Dr. Clifford G. Grulee—Advisory Committee on Child Welfare[4]
Miss Helen Hall—Member, Advisory Council to the Committee on Economic Security[3]
Alvin Hanson—Chief Economic Analyst, Department of State[4]
Harry L. Hopkins—Federal Relief Administrator[2]
Paul H. Kellog—Vice Chairman, Advisory Council to the Committee on Economic Security[3]
Murray Latimer—Chairman Railroad Retirement Board[4]
Wm. N. Leiserson—Chairman National Mediation Board[4]
Miss Katherine Lenroot—Chief, Children's Bureau, U. S. Department of Labor[4]
Hon. Henry J. Morgenthau—Secretary of the Treasury[2]
George Nordlin—Advisory Council on Economic Security[2]
L. H. Parker—Chief of Staff, Joint Committee on Internal Revenue Taxation[3]
Hon. Frances Perkins—Secretary of Labor[4]
Miss Josephine Roche—Assistant Secretary of the Treasury[4]
John W. Studebaker—Commissioner of Education, Department of the Interior[4]
C. E. Waller—Assistant Surgeon General, U. S. Public Health Service[2]
Dr. E. E. Witte—Executive Director, Committee on Economic Security[4]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

that there is nothing we can do about getting old; we either have to get old or die; but that there is some possibility of reducing the amount of unemployment, if proper incentives

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4

Health Agencies and Societies

Dr. T. F. Abercrombie—State and Territorial Health Officers Conference[2]
H. B. Anderson—Citizens Medical Reference Bureau[4]
Rev. George Reid Andrews—American Eugenics Society[3]
Dr. George E. Bennett—Maryland League for Cripplied Children[2]
Dr. Walter Bierring—American Medical Association[2]
S. J. Crumbine—American Child Health Association[4]
Miss Susan Lawrence Davis—Townsend-Davis Clystertory Health Treatments[4]
Lawrence L. Gourley—American Osteopathic Association[4]
Julia Minerva Green—Women's Homeopathic Medical Fraternity[3]
Rt. Rev. Monsignor Maurice F. Griffin—Catholic Hospital Association[2]
Robert Jolly—American Hospital Association[4]
R. J. Knoppel—Vice President, International Society for Crippled Children[2]

5

Individuals Unclassified

Benjamin F. and Henrietta Adams—Silver Springs, Maryland[3]
C. M. Armstrong—Schenectady, New York[2]
Hugo E. Czerwonky—Washington, D. C.[4]
H. H. Halsell—Lubbock, Texas[2]
A. L. Harbison—Tulsa, Oklahoma[2]
Roger Sherman Hoar—North Milwaukee, Wisconsin[3]
Glen J. Hudson—Oakland, California[2]
Philip Ickler—Portland, Oregon[3]
C. G. Kelley—Cleveland, Ohio[2]
Dr. George M. Lyon—Huntington, West Virginia[4]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

are given to the employer to make all the rearrangements, the planning, the control of production, for the purpose of eliminating unemployment. (Hearings before the Committee on Ways and Means of the House, p. 229)

Individuals Unclassified (Cont'd.)

William P. McGervey[2]
James Ragland Miller—Hartford, Connecticut[4]
O. Otto Moore—Denver, Colorado—Representative of Townsend Clubs of Colorado[2]
Dr. Oscar Reiss—Professor, Southern California Medical School[3]
M. H. Reymond—Industrial Engineer[3]
Miss Marquis Robb—Newtonville, Massachusetts[3]
Dr. F. E. Townsend—Long Beach, California[4]
Joseph P. B. Weir—Washington, D. C.[3]
Ernest Wells Williams—Washington, D. C.[3]
Mrs. James H. Wolfe—Women's Division, Democratic Committee[3]
Dr. Rachelle Yarros—Hull House, Chicago, Illinois[3]

6

Labor Interests

I. Amter—National Unemployment Council[4]
John B. Andrews—American Association for Labor Legislation[3]
Nathan Cronheim—Local Action Committee and the Philadelphia Chapter of the Interprofessional Association[3]
David Gordon—Committee for Unemployment Insurance[3]
William Green—President American Federation of Labor[4]
O. J. Hall, Jr.—Local Action Committee for Workers, American Federation of Labor[2]
Thomas Kennedy—International Secretary-Treasurer, United Mine Workers of America, Lieutenant Governor of Pennsylvania[3]
David Lasser—Workers' Unemployed Union[2]
Frank W. McCulloch—Chicago Workers' Committee on Unemployment[4]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

William M. Leiserson, Chairman, National Mediation Board, said that the problem was not one of relief when 60 or 70 per cent. of the elderly unemployed are willing and able to work and are unable to find work. It is a very great injustice to remit them to charity.

Labor Interests (Cont'd.)

Charlton Ogburn—Counsel to the American Federation of Labor[3]
Louis Weinstock—National Committee on Unemployment Insurance, American Federation of Labor[2]
Ralph Whitehead—American Federation of Actors[4]

7.

Miscellaneous Societies and Associations of Particular Classes

Earl Browder—Communist Party[3]
Guy Irving Burch—Population Reference Bureau, New York[3]
John J. Burke—National Catholic Welfare Conference[3]
Wm. D. Gutfirie—Chairman Special Committee of the American Bar Association[3]
C. A. Hathaway—Communist Party in the United States[2]
Richard W. Hogue—Independent Legislative Bureau[3]
Charles H. Houston—National Association for the Advancement of Colored People[4]
Benjamin C. Marsh—People's Lobby[4]
Frank L. Peckham—Sentinels of the Republic[3]
Dr. Ellen Potter—National Committee on Care of Transient and Homeless[3]
Sherwood L. Reeder—U. S. Conference of Mayors[4]
Mrs. Margaret Sanger—President, National Committee on Federal Legislation for Birth Control[3]

8

National Women's Associations

Mrs. Harris T. Baldwin—National League of Women Voters[4]
Louise G. Baldwin—National League of Women's Voters[2]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

" . . . . There is something the matter with industry, and we ought to say that 'here is a fund at the cost of industry out of which you can draw an income, a meager income to be sure, that will keep your family together.' " (Ib. p. 406)

The witness likened unemployment insurance which is paid the worker when his job is cut off to workmen's compensation which is paid him when his toe is cut off, insisting that the same principle should be applied to both situations. (Ib.)

National Women's Associations (Cont'd.)

Miss Elizabeth Christman—National Women's Trade Union League[4]
Mrs. Beatrice Pitney Lamb—National League of Women Voters[4]
Mrs. Charles W. Sewell—Associated Women of American Farm Bureau Federation[3]

9

Religious Societies

George E. Haynes—Federal Council of Churches of Christ in America[4]
George A. Huggins—Church Pensions Conference[4]
Owen E. Pence—National Council, Y. M. C. A.[3]
Mrs. Frederick Shelton—National Board of Young Women's Christian Associations[3]
Bert Wilson—Church of the Disciples of Christ[2]

10.

Representatives and Senators

Representatives

Hon. George Burnham, California[2]
Hon. Sam L. Collins, California[2]
Hon. Wm. M. Colmer, Mississippi[2]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

David Lasser, representing the Worker's Unemployed Union, urged that Congress tell the employing class of America that Congress would provide a sufficiently large public works program to employ all jobless, at living wages, who are thrown out of work; that for those who cannot be so employed unemployment insurance will be provided, which will be charged to "the employers and the wealthy class". (Ib. p. 786). Such a policy would cause all employers to consider carefully "whether they had better not re-employ their workers rather than pay the same wages as an unemployment insurance fund. . . . " (Ib. p. 787)

Representatives (Cont'd.)

Hon. Henry Ellenbogen, Pennsylvania[2]
Hon. David J. Lewis, Maryland[2]
Hon. John L. McClellan, Arkansas[2]
Hon. James W. Mott, Oregon[2]
Hon. Wright Patman, Texas[2]
Hon. Samuel B. Pettingill, Indiana[2]
Hon. Howard W. Smith, Virginia[2]
Hon. Roy O. Woodruff, Michigan[2]

Senators

Hon. Daniel O. Hastings, Delaware[2]
Hon. Robert F. Wagner, New York[3]

11.

Societies and Associations Interested in the Blind

Lewis H. Carris—National Society for the Prevention of Blindness[3]
Robert B. Irwin—The American Foundation for the Blind[3]
H. R. Latimer—Pennsylvania Association for the Blind[3]
L. L. Watts—Virgina Commission for the Blind, and the American Association of Workers for the Blind[3]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.

(1). *Adequacy of the Measure*

Dr. E. E. Witte, Executive Director of the Committee on Economic Security, said that this unemployment program is not a complete program for dealing with the hazards

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12.

Societies and Associations Interested in Welfare of Children

C. W. Areson—Child Welfare League of America, Inc.[3]
Jacob Kepecs—Child Welfare League of America[2]
Mrs. Virginia Kletzer—Child Welfare Commission of Oregon[3]
J. Prentice Murphy—Children's Bureau of Philadelphia[2]

13.

Societies Interested in the Betterment of Social and Living Conditions

Herbert Benjamin—National Council for Unemployment and Social Insurance[4]
R. E. Clements—Old-Age Revolving Pensions, Ltd.[3]
Abraham Epstein—Executive Secretary, American Association for Social Security[4]
George D. Evans—Organization for the Abolition of Poverty[2]
Miss Dorothy Kahn—American Association of Social Workers[3]
Mrs. William Kittle—The National Consumers' League and Women's Homeopathic Medical Fraternity[4]
C. C. Mayer—End Poverty in Civilization Society[2]
Miss Lea D. Taylor—Illinois Committee on Social Security[3]
Miss Mary Van Kleeck—Russell Sage Foundation[2]
M. M. Walter—National Rehabilitation Association[3]

14.

State Agencies

Elmer F. Andrews—State Industrial Commissioner of New York[3]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

of unemployment; that it is complementary to the proposal of a work program (Ib. p. 133). The benefits, while limited, are valuable. At the time they are paid the employee has a reasonable prospect of getting back to his old employment (Ib. p. 141).

State Agencies (Cont'd.)

M. L. Brown—Old Age Pension Bureau of Ohio[2]
R. R. Clark—Supervisor of Rehabilitation, State of Illinois[2]
Homer Folks—Secretary, State Charities Aid Association, New York[2]
Clarence E. Ford—Acting Commissioner of Social Welfare, New York[2]
H. D. Hicker—Chief of Bureau of Vocational Rehabilitation of California[2]
Harry H. Howett—Secretary-Treasurer, Michigan Crippled Children's Commission[4]
Mrs. Blanche La Du—Minnesota State Board of Control[3]
John J. Lee—Department of Public Instruction, Michigan[2]
Dr. R. M. Little—State Educational Department, New York[2]
Dr. A. T. McCormack—Commissioner, State Board of Health[3]
Dr. Thomas Parran—State Health Commissioner of New York[2]
Miss Olivia Peterson—Minnesota Department of Health[2]
Charles B. Reed—Illinois State Medical Society[2]
S. Merwin Sinclair—Executives of State Commissions and State Agencies for Blind, and Pennsylvania Council for the Blind[3]
Dr. Lillian R. Smith—Michigan Department of Health[2]
Joseph Sweeney—President, Child Welfare Board of Cuyahoga County, Ohio[2]
Mrs. Alfred Moore Tunstall—Director Alabama State Welfare Department[2]
Dr. F. J. Underwood—Mississippi State Health Officer[3]
Dr. Alfred A. Walker—Chairman Board of Health, Jefferson County Medical Society[2]

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(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committees.

William Green, President of the American Federation of Labor, objected to the amount of the tax as being inadequate to provide a shorter waiting period than four weeks and to pay the employee a larger compensation than that contemplated with the maximum of $15.00 per week for fifteen weeks (Ib. p. 392). He recommended that the tax be increased to five per cent. Unless benefits are extended considerably beyond fifteen weeks, they will not cover the time which experience shows the unemployed seek work before they find it. Even in times of prosperity 54 per cent. of the unemployed wage earners would fall outside the period

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15.

Universities, Schools, and Related Subjects

Mrs. Mary T. Bannerman—Committee on Legislation, Congress of Parents and Teachers[3]
Miss S. P. Breckinridge—School of Social Service Administration, University of Chicago[2]
J. Douglas Brown—Director Industrial Relations, Princeton University[4]
Dr. Eveline M. Burns—Columbia University[4]
Dr. Paul H. Douglas—University of Chicago[4]
Dr. Allen W. Freeman—School of Hygiene and Public Health, Johns Hopkins University[2]
Percival Hall—Chairman Executive Committee, Conference of Executives of American Schools for the Deaf[3]
Clarence A. Kulp—University of Pennsylvania[3]
Mrs. B. F. Langworthy—National Conference of Parents and Teachers[2]
Dr. Cloyd H. Marvin—American Council on Education[3]
E. V. McCollum—Johns Hopkins University[4]
Dr. James R. McCord—Emory University[3]
Miss Louise McGuire—National Association of Classroom Teachers[2]
Francis D. Tyson—Professor of Economics, University of Pittsburgh[3]

(2) Appeared before House Committee.
(3) Appeared before Senate Committee.
(4) Appeared before both House and Senate Committee.

provided during which benefits could be paid under a 3[1] per cent. tax; 26 per cent. would find work within the waiting period of four weeks and 28 per cent. would be out of work more than fifteen weeks. In times of depression or extended unemployment, as high as 80 per cent. of the unemployed wage earners would fall outside the benefit period, while in average times 60 per cent. would be outside. (Ib.)

(2). To Avoid Competition Between Industries in Different States

Dr. Witte stated:

" . . . The purpose of the entire scheme is to make it possible for States to enact unemployment compensation acts. States cannot very readily burden their employers with the cost of unemployment compensation, unless they know that their competitors in other States will also have that same cost. . . .

"The system operates so that employers in a State that does not enact an unemployment compensation act will have the same cost as employers in States that do not enact an unemployment compensation act. The disadvantage that a State puts itself under by enacting such an act is removed by this bill. (Ib. p. 136)

* * * * *

"The contribution by the employer is made uniform because it is impossible for the States to act unless the cost to the employers throughout the country is uniform. I think that is elementary. (Ib. p. 142)

* * * * *

"Mr. Cooper (of Tennessee). Doctor, if I understand the underlying principle supporting the idea of a Federal tax, it is to make it uniform throughout the entire country?

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1 Changed to 1 per cent. for 1936, 2 per cent. for 1937, and 3 per cent. thereafter. (Sec. 901)

"Mr. Witte. Yes, sir." (Ib. p. 145)

Mr. Cooper (a member of the Committee) stated that "we are legislating for a long time in the future here." (Ib. p. 147)

Miss Perkins, Secretary of Labor and Chairman of the Committee on Economic Security, stated that levying the same tax whether or not there is an unemployment-insurance law in a state "is a very real equalization of competitive costs between employers in the various states, so that there will be no special advantage to any employer to continue to carry on his business in a state which does not have an unemployment insurance law." (Ib. p. 183)

Alvin Hansen, Chief Economic Analyst, Department of State, and chairman of the sub-committee considering the unemployment features of the measure, set out the intention of the bill to be to "equalize the interstate competitive situation. . . " If the states wished to impose heavier contributions, that was their business; but at any rate "there would be an equalization of interstate competition to the extent that each state would tax the employer 3 per cent." (Ib. p. 377)

Albert D. Hutzler, Vice Chairman, National Retail Dry Goods Association, referred to the fact that there were missing from the bill minimum standards of compensation, which should be written into the bill

> "in order that no State may adopt such low standards that most industries can take advantage of differential rates and thus give partially cooperating States a competitive advantage over fully cooperating States. (Ib. p. 773)
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> * * * * *
>
> "Mr. Cooper . . . The point I am asking you at this time is whether or not you recognize that the under-

lying principle which forms the basis for the system of unemployment insurance from a national standpoint, is the question of competition.

"Mr. Hutzler. Competitive concerns should have equal opportunities under it. (Ib. p. 780)

* * * *

"Mr. Cooper . . . In other words, the purpose of having a national unemployment insurance system other than having State unemployment insurance systems is to try to strike at the question of competition, is it not?

"Mr. Hutzler. Oh, absolutely." (Ib. pp. 780-1)

Mr. Cooper, while questioning Senator Hastings, who was before the Committee, stated that the Committee had been led to believe that the underlying principle supporting the idea of levying a federal tax was the necessity of meeting the question of competition that would arise and would be a very serious question that would have to be encountered; that he believed it had been rather clearly shown all along that

"it is highly desirable to have a uniform rate of tax levied on industry throughout the entire country so as not to produce a situation where the industry of one State can undersell the industry of another State because that other State has to bear a tax that it does not.

"Senator Hastings. I think that is very important. It is the one argument in favor of this bill that is sound, in my judgment, economically." (Ib. p. 961)

The Report of the Advisory Council to the Committee on Economic Security set out that disadvantages in interstate competition are always raised against purely state legislation that involves costs to industry; that this knot should be cut by requiring industries in all states (whether the states enact

unemployment compensation laws or not) to make uniform payroll contributions. (Ib. pp. 882-3)

The minority of the Council adopted a motion recommending the tax-credit type of law as having, among others, the advantage of requiring uniformity where uniformity is essential, namely the equalization of competitive costs. (Ib. p. 883)

(e). Report of Ways and Means Committee of the House

The report (No. 615) traces the history of the legislation beginning with the President's message of June 8, 1934, the appointment by him of the Committee on Economic Security which devoted six months to the study of the subject, assisted by its staff of specialists and by fourteen advisory groups; refers to the President's message of January 17, 1935 adopting the report and forwarding it to Congress. The committee report sets out the purpose, scope and need for the legislation.

Under the question of unemployment compensation the report notes that the establishment by the states of unemployment compensation systems is urgently to be desired in order to provide something better than relief on a needs basis for the unemployed of the future; that TITLES III and IX seek to encourage the states to set up such systems and to keep them from being handicapped if they do so. (Report, p. 7)

The report undertakes to tread softly with reference to the standards imposed on the states (Ib. pp. 8-9), but sets out on later pages a list of requirements as contained in the bill (Ib. pp. 34-5).

(1). Adequacy of the Measure

Unemployment is due to many causes and there is no one safeguard that is all sufficient. Provisions must be made for the relief of those now unemployed, and there should also be devised a method for dealing with the unemployment problem in a less costly and more intelligent way in future years. State unemployment compensation plans are designed to afford security against the large bulk of unemployment in the future. The essential idea in unemployment compensation is the accumulation of reserves in time of employment from which partial compensation may be paid to the unemployed for a limited period and for a percentage of the wage loss. In normal times it will enable most workers who lose their jobs to tide themselves over without having to resort to relief, to which it is greatly preferable because it is given without any means test. (Ib. p. 7)

The failure of the states to enact unemployment insurance laws is due to the competition to which their industries would be subjected with those of other states. It is therefore necessary before the states can go ahead to impose a

> "uniform, Nation-wide tax upon industry, thus removing this principal obstacle in the way of unemployment insurance, . . . (Ib. p. 8)
>
> "This is one of the purposes of title IX of this bill. . . . " (Ib.)

The report refers to the important functions which the Federal Government under the bill has to perform

> "in order to make it possible for the States to have unemployment insurance laws and to facilitate their operation. It equalizes competitive conditions through the

imposition of the employment excise tax provided for in title IX. . . . " (Ib. p. 9)

(f). Hearings before the Committee on Finance of the Senate

Before the Senate Committee on Finance the history and evils of the times were more extensively discussed than before the Committee on Ways and Means of the House. Senator Wagner, the author of several prior bills of like purpose, was a member of the committee and took a foremost part in its deliberations. "What can human ingenuity do," asked he, "to prevent economic disorder in its most widespread and virulent forms from leading to national disaster? This may be called the problem of industrial stabilization." (Hearings before Committee on Finance, U. S. Senate, p. 2)

" . . . Unemployment is also the force that attacks and destroys those who live on the narrow margin of security. Lost profits may be regained upon the upward swing of the business cycle, but the working day that is lost is gone forever. Above all, the secret of unemployment is the key to industrial stabilization. In 1929 fluctuations of 600 per cent. in the volume of unemployment were the storm signals of depression. When we discover how to keep men at work, we shall have discovered all.

"Unemployment insurance ranks high in the list of remedies for unemployment. In respect to those disinherited during normal times, it is more economical than relief because preparedness is better than planlessness; and it is more humane because it does not rest upon the degrading means test which assumes that society has no duty to the idle worker until he is destitute." (Ib.)

Others who discussed this subject fully were Miss Perkins, Secretary of Labor, and William Green, President of the American Federation of Labor.

Miss Perkins' forecast for the present generation of children is an "infinitely complicated" life, unless provisions are made for unemployment, as well as for old-age and sickness. (Ib. p. 101) An accumulation of these various types of unemployment, together with world-wide depressions which are partially financial and partially economic in their causes, creates a situation over which no employer has any control. Some people become completely destitute. Others have their incomes reduced. For instance, the general trend of one industry from New England States to the Southern States has put out of work in the former a large number of people formerly attached to that industry, who faced a prolonged period of social readjustment for which no particular provision was made, and which constituted a very serious cause of destitution.

> " . . . I should like to say with regard to unemployment insurance that the circumstances of the last few years have certainly impressed most of us with the necessity of making preliminary provisions for benefits to unemployed persons in order to carry them, as individuals, through periods of depression when, through no fault of their own, they are without work, and also to provide that preliminary provision for their individual needs, or at least modify the relief programs as they affect localities, States, and even the Federal Government." (Ib. p. 111)

Mr. Green, in his presentation of the viewpoint of labor regarding the proposed social-security legislation recalled that during every depression we have had in recent years, we talked about unemployment insurance, plans for which were

always forgotten with a return of prosperity. The United States is the last great industrial country to give serious consideration to a system of unemployment insurance, being decades behind in the development of a social program, comprehensive systems having been in practical operation in various foreign countries for many years. (Ib. p. 141) Today the lives of millions of our people are governed by the fear of losing their jobs. Economic security today and for a long time will be our greatest national problem. The bitter experiences of the past five years have rudely shattered our belief that this problem would take care of itself. (Ib. pp. 141-2) In our continued dependence upon relief we see the gravest dangers to our wage-earning population. Relief must be a temporary and emergency measure, "unless we wish so seriously to undermine morale that many men and women will never again be self-sustaining or self-respecting citizens." (Ib. p. 142) During the present years of unemployment the members of organized labor have contributed out of their earnings more than sixty million dollars per annum in an attempt to extend temporary relief for unemployment relief, sickness and out-of-work benefits; some trade unions are struggling in an effort to care for their unemployed members, "and as a result are contributing a very large percentage of their own earnings for the purpose of taking care of the unemployed." (Ib. pp. 142-3)

Miss Perkins stated that the thing for us to do as a group "is to provide socially for the method of taking care of the people who are most adversely affected by such a depression." (Ib. p. 102) It seems wise, therefore, to take steps in advance "to provide for a steady income to people when they are unemployed through no fault of their own. . . ." (Ib.)

Mr. Green said that

"if employers are going to continually displace workers, then they will have to be prepared to pay more out of their earnings to take care of those displaced. They have to increase the tax; that is all. (Ib. p. 145)

* * * *

"We can hope and expect only that unemployment insurance will help to maintain wage levels and will exert some stabilizing effect upon our industrial system. We may hope also, I believe, that it will help in bringing about a more equitable distribution of income than we have had in the past or have at the present time. (Ib. p. 154)

* * * *

"Senator Couzens. Did your committee give any consideration to the fixing of an annual income for these workers and making it a charge against industry?" (Ib. p. 214)

Dr. Witte:

"We felt that by legislation you cannot reverse the entire tide. We have in this bill provisions to encourage what we call guaranteed employment, which is essentially an annual salary idea." (Ib. p. 215)

In the Report of the Advisory Council to the Committee on Economic Security, dated December 18, 1934, it is said that the plan should promote security by providing compensation for workers who are laid off, and should serve as an incentive to employers to provide steady work and to prevent unemployment. (Ib p. 226)

Wm. N. Leiserson, Chairman of the National Mediation Board, stated the purpose of the unemployment tax [fix-

ed at 3 per cent. in the bill being considered by the committee (Sec. 601)]

> "is really to meet only one situation. The National Government is called upon to pay out great sums of money in doles. There is no way of avoiding it if you make no other provision for unemployment. The National Government therefore wants to stimulate the States to provide for their own people, in their own way, and one way is unemployment insurance, and it is not the only way." (Ib. pp. 273-4)

J. Douglas Brown, Director Industrial Relations Section and Professor of Economics, Princeton University, stated the purpose of the federal-state cooperation to be

> "to stimulate a more intelligent stabilization of industry and to provide more security for the workers. . . . " (Ib. p. 316)

Abraham Epstein is one of the leading authorities in this country on social security. He describes unemployment insurance as being chiefly interested in offering a system whereby the unemployed workers, who through no fault of their own lose their jobs, can at least be given self-respecting financial assistance without being placed on relief as paupers immediately after they lose their jobs. Its aim is to provide at least a first break to the unemployed worker when he loses his job through no fault of his own, as long as it can be done and for as many weeks as possible (Ib. p. 464)

> " . . . but essentially let us keep that in mind, that we are concerned with one thing only in this bill, and that is to offer the best bulwark to the unemployed workers.
>
> * * * *
>
> "That purpose of providing a break for the unemployed worker, regardless of the stabilization and unemploy-

ment, is the chief purpose of unemployment insurance as it is brought about and as it is understood by all students, . . . " (Ib.)

The Advisory Council to the Committee on Economic Security consisted of twenty-three members (Report, p. 51). Six members of the committee (M. B. Folsom, M. E. Leeds, S. Lewisohn, Raymond Moley, Gerard Swope and W. C. Teagle) on December 15, 1934 made a supplemental statement to the report which the council had theretofore made to the Committee on Economic Security, in which they set out the following:

"1. The first objective that should be encouraged is stabilization of employment, or assurance of employment, and this is along the line of the President's pronouncement that, if this could be accomplished, the worker would be able to look forward to at least a minimum amount for an annual wage on which to plan his family's support. This should produce better work at lower cost, reflected in lower selling prices and a consequent increase in consumption on the part of the community. . . . " (Ib. p. 324)

A report was submitted to the Industrial Advisory Board by the Unemployment Insurance Committee, acting at the request of the former. The report set out that unemployment compensation is, primarily, a social service.

Miss Perkins:

" . . . we expect the States to provide systems of unemployment insurance which will pay cash benefits for limited periods of time, a period limited by the size of the fund and by the actuarial principles of keeping the fund sound." (Ib. p. 119)

Senator Black of Alabama:

"A maximum of 6 months?

"Secretary Perkins. Fifteen weeks, perhaps or 26 weeks; the duration depends on various factors.

"Senator Black. Yes. (Ib.)

* * * *

"Senator Black. Let me see if I understand the basis of your viewpoint for distinguishing between the two. As I understand it, then, it is your view, so far as unemployment insurance is concerned, that it takes care of temporary unemployment only?

"Secretary Perkins. That is all.

"Senator Black. Probably caused by technological changes, shifting from one plant to another, or temporarily closing down of a plant.

"Secretary Perkins. Seasonal variation.

"Senator Black. So far as that is concerned it is your opinion, and perhaps the opinion of the committee, that it is proper for that to be taken care of locally on the theory that if local communities have to take care of it it would be an incentive to reduce such temporary unemployment?

"Secretary Perkins. Yes, sir.

"Senator Black. But insofar as unemployment lasting over a long period of time is concerned, the hazards of health, hazards of old age - - (Ib. p. 124)

"Secretary Perkins. And dependency of youth.

"Senator Black. And dependency of youth, over a long period, that the committee is of the opinion that that is not purely local and would call for Federal aid to the localities.

"Secretary Perkins. Yes, sir.

"Senator Black. Thank you.

"Secretary Perkins. That is the principle involved in this bill." (Ib. p. 125)

Mr. Green expressed the hope that unemployment insurance would help to maintain wage levels, to exert some stabilizing effect upon our industrial system, and to bring about a more equitable distribution of income than has existed in the past or exists in the present. (Ib. p. 154). Employees would have to work a certain length of time and make certain payments, the plan being an insurance feature. (Ib. p. 169)

Dr. Witte defined the concept of unemployment compensation as

> "merely a measure to give a limited benefit to employees during a period while they have a reasonable opportunity to be taken back within a short time in their old positions. Unemployment compensation, if it is not to be mere relief, must be based on the contributions that are received. Unless the contribution rates are extremely high, the period during which compensation can be paid will necessarily be quite limited." (Ib. p. 215)

Mr. Leiserson likened the remedy to fire insurance, which is just "to help people who suffer to avoid some of the suffering." (Ib. p. 271)

From the Preliminary Report of the Technical Board to the Committee on Economic Security, we take the following:

> "(a) Unemployment insurance is an essential measure for the economic security of the most stable part of our industrial population, but is not a complete, all sufficient solution of the problem." (Ib. p. 327)

M. B. Folsom, Assistant Treasurer, Eastman Kodak Company, stated the purpose of the legislation to be to provide, or to build up, a fund from which to pay benefits to people who are laid off for a limited period. (Ib. p. 555)

Miss Helen Hall, President National Federation of Settlements and Member of the Advisory Council to the Committee on Economic Security:

> " . . . unemployment compensation is one way of adjusting the loss so that the unemployed themselves and their children shall not bear the whole burden of lost earnings, with resulting deprivation and misery. . . . " (Ib. p. 769)

Robert G. Elbert, one of the signers of the Report of the Unemployment Insurance Committee to the Industrial Advisory Board, said that the insurance system will act as a dam against the rising tide of distress. (Ib. p. 845). Unemployment insurance is based on the idea that a reserve fund will be accumulated in normal times to meet the contingency of unemployment in eras of depression; to carry the insured over out-of-work periods in normal times. (Ib. p. 848)

Miss Lea D. Taylor, of the Illinois Committee on Social Security, said that the 3 per cent. payroll tax "is entirely inadequate and does not provide security to the worker. . . . " (Ib. p. 975)

(1). Work Benefits to be Paid After Compensation is Exhausted

It was practically the unanimous thought of the proponents of the measure that the government would be required in periods of world-wide or national depressions over

which no group has any control to make its contributions in the form of a supplemental system of work benefits "paid for out of federal taxes" to which the unemployed could look after their cash benefits had been exhausted. (Miss Perkins, pp. 119-120)

(2). To Avoid Competition Between Industries in Different States

So long as the Federal Government remains dormant, there will be practically no unemployment insurance at all. After decades of propaganda and education, only Wisconsin has by enacting a law of its own dared to throw down the gauntlet to the interstate competition of other states with lower standards. (Senator Wagner, Ib. pp. 3-4). The purpose of the credit of 90 per cent.[1] was to put all states on a parity so that if a state refuses to pass a law it hasn't the competitive advantage gained by its low standard. "That is the purpose of the Act." (Ib. p. 22)

Miss Perkins: The effect (of the 3 per cent. tax) is to equalize the competitive cost of manufacturing between the states by equalizing the amount of the contribution (Ib. p. 122); the purpose being

> "to equalize the cost of doing business in every State, so far as it can be equalized, with regard to taking care of unemployed persons." (Ib. p. 126)

Dr. Witte said:

> " . . . The States cannot act—experience has shown that amply—the States cannot act unless the competitive disadvantage to which the employers within a given State are subjected by having an unemployment compensation

[1] Social Security Act, Section 902.

law while neighboring States do not, is removed." (Ib. p. 220)

The Report of the Advisory Council to the Committee emphasizes the effect of the measure as securing

"uniformity where uniformity is essential, namely, the equalization of competitive costs." (Ib. p. 227)

Dr. Witte: Very few states will act

"so long as the Federal Government does not remove the disadvantage to which employers in such a State are under in interstate competition. . . . " (Ib. p. 240)

The disadvantage resulting to a state enacting such a law has defeated many such bills and

"Unless you remove that great obstacle to State action you cannot or are not likely to have unemployment compensation laws along State lines." (Ib. p. 241)

The same view was presented by Mr. Leiserson (Ib. p. 274) who suggested that when employers in a state are shown that they will have to pay the (federal) tax anyway, as will their competitors

"that objection will be removed and they will go along with State laws, which many of them have said they would like to have if they could." (Ib. p. 274)

J. Douglas Brown: The employer contribution

"makes uniform throughout industry a minimum cost of providing old-age security and protects the more liberal employer now providing pensions from the competition of the employer who otherwise fires the old person without a pension when superannuated." (Ib. p. 284)

Elmer F. Andrews, Secretary of the American Association for Labor Legislation, said that the good employer will not be

> "undercut unfairly in competition with his competitors in States that otherwise might not take the legislative action." (Ib. p. 442)

Mrs. Beatrice P. Lamb, representing the National League of Women Voters, (Ib. p. 443) and Mrs. Frederick Shelton, representing the National Board of Young Women's Christian Associations (Ib. p. 444) upheld the argument that the tax would remove the element of competition.

Senator Harrison, Chairman of the Committee and the Senator in charge of the bill on the floor of the Senate, referred to the competitive system as bringing about an unjust result to the manufacturers in the states putting on the tax, to which Mr. Epstein replied that this argument against the tax was being met by requiring all employers to pay the same tax. Mr. Epstein inquired:

> " . . . all employers would be paying the same tax, but after all, Senator, what are you after? Are you after just merely levying a tax on the employers, or are you after providing benefits for unemployed workers? . . . " (Ib. p. 468)

Albert D. Hutzler of Baltimore, Vice Chairman of the National Retail Dry Goods Association, said that the retailers, having studied the bill at great length, believed that a national law should be passed so that interstate competition would be the same, but that the funds should be contributed by the employer, the employee and the state. (Ib. p. 712)

Paul H. Kellogg, Editor The Survey and Survey Graphic, and Vice Chairman of the Advisory Council, Committee on Economic Security, referred to the fear of interstate competition which for twenty years had kept the states (except Wisconsin) from acting, said that once the payroll tax provisions of the bill are passed, the disadvantage in one state of protecting employees against unemployment will no longer exist and the dread of unfair competition will be lifted.

> "The Wagner-Lewis bill will mark a great advance in using the force of congressional enactment as a leverage to overcome the drag of interstate competition. The Federal payroll tax provided for in the bill will free and spur the States to act, and its funding provisions will pry the reserves raised into the custody of the Federal Treasury to prevent their chaotic handling. (Ib. p. 904)
>
> * * * *
>
> "To start action the country over, and to start it right, the bill recognizes the need for national leverage. We look to the Federal pay-roll tax to get the States to act. By the same token we should look to national standards in the Federal bill to assure minimum protection the country over. If we let them slide now we shall be confronted later on with the coalesced resistance of States and industrial interests to any interference with their own standards, however meager. Instead of scotching the snake of interstate competition, we shall have it in this new guise, harder to combat, putting employers in progressive States at a new disadvantage and stultifying the attempt to give security to wage earners everywhere." (Ib. p. 905)

James A. Emery, Counsel for the National Association of Manufacturers, commenting on the claim of interstate competition, raised the specter of foreign competition. (Ib. pp. 925-6)

Dr. Eveline M. Burns, Columbia University, who prepared an article on the bill (S. 1130) lamented its failure to go further and lay down the essential standards to be required of approved unemployment insurance schemes; the absence of which

> "seriously limits the extent to which the general 3 percent. tax levy protects business men from unfair competition from States which enact inadequate unemployment-compensation laws." (Ib. p. 1007)

Miss Grace Abbott, Editor Social Service Review and Professor of Public Welfare, University of Chicago, commented that as a result of the uniformity in the tax levied "the competitive aspect is withdrawn." (Ib. p. 1081)

Henry E. Jackson, President Social Engineering Institute, New York City, regards the "depreciation of human machinery" as a proper charge to production cost, to be absorbed as such if our industries are all on the same basis of competition. (Ib. pp. 1112-13)

(g) Report of the Committee on Finance of the Senate

Senator Harrison, Chairman of the Committee on Finance, submitted the report on May 20, 1935. The committee in the report referring to the trying years of the depression stated that "unemployment is the most important single cause of dependency . . . . a hazard which confronts all industrial workers . . . ." (Senate Report No. 628, Committee on Finance, U. S. Senate, 79th Congress, 1st Session, May 20, 1935, p. 10) The report continued: The present is the most opportune time for launching the plan. Great interest exists in the subject and improved conditions forecast the building up of considerable reserves within the next few years. Delay

the plan, and reserves otherwise available for the next industrial crisis will be correspondingly lessened. (Ib. p. 16) The depression demonstrates the great cost of "the folly of failure" to make timely provision for social security. (Ib. p. 27)

(1). Adequacy of the Measure

Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis. The period of payments is related to the prior period of employment. After the waiting period compensation is paid at a stated percentage of the prior wage, with a minimum and maximum rate. Beneficiaries must accept suitable employment when offered or they lose their right to compensation. (Ib. p. 11) To the extent that unemployment reserves are accumulated, they will reduce the necessity for relief. In normal periods unemployment compensation will provide a sufficient safeguard for most of the unemployment that will occur, and in depression periods very materially reduce the burden of relief costs. (Ib. pp. 15-16) "That we must have a greater degree of security than has prevailed heretofore . . . . . if our social order is to endure, is tragically evident." (Ib. pp. 27-8)

(2). Work Benefit to be Paid After Compensation is Exhausted

Supplemental to unemployment compensation is need for work relief after compensation is exhausted and for workers outside the compensation system. (Ib, p. 11)

(3). To Avoid Competition Between Industries in Different States

Interest in unemployment compensation began with the depression of 1920-21. Bills on this subject have been intro-

duced in state legislatures, but until 1932 all were defeated, "principally on the argument that no state can afford to handicap its employers in competition with those of other States. . . ." (Ib. p. 11) Under the plan proposed in the bill the handicap of competition will be removed. (Ib. p. 16)

> " . . . With a uniform tax and its offset device, employers in all States will be put in an equal competitive position. No State can gain any advantage through failing to establish an unemployment compensation system. This provision will equalize competitive conditions and thus enable States to enact unemployment compensation laws without handicapping their industries." (Ib. p. 13)

(*h*). *Statements made in House of Representatives*

Mr. Greenwood of Indiana feared that the monoply arising from the profits accruing to the management of industry would not be divided with those who worked with their hands; that the invention of machinery crowds out hundreds and thousands of men and women workers. (Cong. Rec. Vol. 79, Pt. 5, p. 5455). He favored the measure which turned the advantages accruing from the machine to the care of the people displaced. (Ib. p. 5456)

Mr. Scott of California agreed with Mr. Greenwood that more wealth resulted from technological development and contended that such wealth should be in turn devoted in part to provide unemployment insurance. (Ib. p. 5477)

Mr. Truax of Ohio:

> "Unemployment is due not only to the depression but to tremendous concentration of wealth in the hands of a few, massed industry, and the mechanistic age. I heartily approve of unemployment compensation. The cost should be borne, however, by the large industrialists who

profit by the sweat and toil of wage workers . . . . (Ib. pp. 5689-90)

* * * * *

". . . . The steam shovel, the tractor, the road grader, the huge concrete mixer, the cigarette robot displace permanently thousands of workers. Here, unquestionably, shorter hours, less days per week, and at the same weekly wage level as was formerly received for the longer hour day and week, must prevail in the end. To bridge the gap now between wholesale and ruinous unemployment, workers' compensation must be established." (Ib. p. 5691)

Mr. Mott of Oregon stated that with the last thirty or forty years, and particularly the last ten years, the improvements in methods of producing and distributing the necessary commodities required only a portion of our population to provide all we need and are able to buy. (Ib. p. 5586)

Mr. Doughton, Chairman of the Ways and Means Committee, and in charge of the bill:

"The need for unemployment insurance is well recognized. Eighty-five percent of the families on relief are in want because of unemployment. Unemployment, or the fear of unemployment, has been the principal reason for the unfortunate decline of our purchasing power. No greater hazard confronts the American worker today than that of losing his job. . . . (Ib. p. 5476)

"Unemployment insurance is based upon the principle of laying aside reserves during periods of employment to be used in periods of unemployment. . . . (Ib.)

"It is undoubtedly true that what the American citizen wants and needs, above all else, is steady employment, but under modern economic conditions and with the rapid development of machine techniques, it is inevitable

that large numbers of workers will be thrown out of work from time to time. . . ." (Ib.)

Mr. Eaton of New Jersey:

" . . . . And as for the hazards of life, Mr. Chairman, how are you going to avoid hazards? They are the essence of life. There will not be a blade of grass grow to maturity this summer that does not have to fight for its existence every moment. (Ib. p. 5580)

" . . . . This is a crazy notion, as expressed in a lot of this new-deal legislation, and accepted by increasing numbers of our people, that somehow, by some legerdemain, the Government of the United States can make it impossible and unnecessary for any of its citizens to face any difficulty, to run any risk, to bear any burden, but to be assured an income in youth, childhood, and old age, and even after they die. The thing is absolutely absurd. (Ib.)

* * * * *

"Mr. Chairman, I think we stand today in this country at the crossroads of a great decision which transcends all parties, all sections, and all interests; and this decision is whether we are going to choose American organized industry as the instrument for the solution of these tremendous, far-reaching problems, or whether we are going to resort to some modified form of Russianism and attempt to solve these problems by government. . . . . the ultimate aim of the new deal is to place all American industry, business, and individual liberties under the control of Government here in Washington. We have no Democratic Party and we have no Republican Party functioning as such in an American way. We are in a state of suspense awaiting to see what under heaven's name is going to happen to the country and to our Government." (Ib. pp. 5581-82)

Mr. Dirkson of Illinois thought that

". . . . the matter of effecting happiness for our people is one of the basic objectives of government." (Ib. p. 5811)

Mr. McCormack of Massachusetts:

". . . . Under our economic system, known as the 'profit system', we shall always have the employer and the employee. As a result of this relationship, problems arise which require action on the part of the Government to control and regulate, where the general welfare is involved, whenever abuses arise out of private industry and whenever private industry is unable to control them, the continuance of which abuses would be inconsistent with the welfare of the country. Under such circumstances some agency must step in and assume the burden of correcting such abuses in the interest of the general welfare; and in the past, as we see again in the pending bill, this agency is government itself." (Ib. p. 5871)

Mr. Knutson of Minnesota:

"Business recovery at the present time hangs in a very delicate balance. Every additional burden of this kind upon business, however small, tends to make recovery more remote; hence, imposing directly upon industry such a tremendous burden as I have mentioned is bound to cause a reaction which will result in prolonging the depression indefinitely.

* * * * *

"The prime need of the hour is recovery, not social reform. Since these proposals to which I am opposed are definitely within the scope of social reform, there is no compelling reason for taking them up at this time unless when so doing we provide a proper measure to restore business volume." (Ib. p. 5544)

Mr. Dickstein of New York:

" . . . Unemployment is even more of a curse of modern society than is dependent old age. Some plan of unemployment insurance had therefore to be devised if ours was to be a country where the individual was to live happily and enjoy the blessings of civilization. . . ." (Ib. p. 5704)

Mr. Rich of Pennsylvania:

"Today, while we are talking about social security and trying to take care of the people of this country, it seems to me there is only one way you are going to be able to do it, and that is to let the business people of the United States try to employ other people in the United States so that we can be our brother's keeper, and in this way we will furnish employment, so that men may earn bread and butter for their children and for themselves in order that they may sustain life. . . ." (Ib. p. 5795)

Mr. Doughton of North Carolina:

"The proposed bill presents a broad plan for social security, embracing measures for (1) protection against destitution and dependency in old age, (2) unemployment compensation, (3) security for children, and (4) increased public health protection. These measures of protection against the principal causes of destitution and dependency, taken together, in conjunction with the immediate program of public works, and with the cooperation of the States, will provide a coordinated plan for social security. It is of great importance that the many overlapping phases of insecurity should be approached in this manner, rather than through separate piecemeal proposals. (Ib. p. 5468)

* * * * *

"The essential feature of the social-security bill is that of social insurance against the principal hazards or

risks which have caused American families to become dependent upon relief. These causes are well known: (1) Unemployment, (2) old age, (3) lack of a breadwinner in families with young children, and (4) sickness. The bill includes comprehensive measures against all but the last of these. Measures proposed to furnish protection against the risks arising out of old age and unemployment are usually called social insurance. Social insurance protects the worker and his family against dependency by enabling them, with the help of their employers, to build up reserves which may be used during periods of unemployment and in old age . . . . . (Ib.)

* * * * *

"Title VII establishes a social-security board of three members, appointed by the President for overlapping terms of 6 years each. The social-security board will have charge of the administration of the grants in aid to the States for old-age pensions and the administration of the Federal old-age-benefit system. It will also be responsible for the certification of State unemployment-compensation systems and is charged with the duty of making actuarial and scientific studies of the broad problems of social security." (Ib. p. 5476)

Mr. Hill of Washington:

"Mr. Chairman, this legislation is forward looking. It means to take care of the future and create conditions in the future operation of the industry and economics of this country that will absorb some of the shock of these panics and depressions; at least tend to stabilize industry and employment and carry the country along over the rough spots until conditions may be righted . . . . . " (Ib. p. 5536)

Mr. Eaton of New Jersey:

" . . . . I am especially opposed to it in the part that has to do with unemployment insurance in industry. I

think I can speak with some authority on this subject, because I have spent the last 18 years of my life in the industries of this country, based upon the belief that industry has become the chief instrument of modern civilization, and unless industry in some way is permitted to function and solve its problems by its own initiative and in accordance with its own nature I do not see how civilization can escape final collapse. I admit with sorrow the failure of industrial leaders in the past to face the social implications of their job. They have been deluded, like everyone else, by the notion that a part is greater than the whole. But this ought not to involve capital punishment for all industry, nor does it justify turning all industry over to the control of politically minded bureaucrats." (Ib. pp. 5580-1)

Mr. Kenney of New Jersey:

". . . . The passage of this bill has for its purpose the lifting of worry and economic insecurity from the minds and backs of our people. Perchance the method employed by the bill is not the ideal way to accomplish our purpose. And to me there is a close constitutional question involved on the job-insurance provisions. But I shall vote for the bill as it is looking forward to the security of our employed, and that means the Nation." (Ib. p. 5606)

Mr. Cullen of New York:

"The economic-security bill presents the most substantial evidence to date that our twin objectives of recovery and reform are found in an inseparable unity of purpose and action. While the horror of the depression is still fresh upon our memory, we are taking decisive steps to shake off its lingering aftermath, to prevent its recurrence, and to set up safe guards for those who may suffer in the future from economic forces beyond the control of the individual. (Ib. p. 5685)

* * * * *

"Another important feature of this bill is the provision for unemployment insurance. There is no reason why the worker unemployed through no fault of his own should be more neglected than machinery that is idle during the slack season. There is no justification for giving the man who has grown old and tired in the performance of his life's work no consideration for his efforts. The day has passed when the wealthiest nation in the world can remain the most delinquent in its treatment of the most pressing of all social questions." (Ib.)

Mr. May of Kentucky:

". . . . It [the measure] grows out of conditions that have fastened themselves upon this country during this depression, and I may say that in the report of the majority of the committee as to the purpose and scope of the bill, I think they state it very soundly when they say that this is laying the foundation for social security in the future, . . . " (Ib. p. 5779)

Mr. Healey of Massachusetts:

". . . . They [members of the minority party] fail to visualize the tendency of unemployment insurance toward stabilizing and insuring steady, year-around employment." (Ib. p. 5813)

Mr. Haines of Pennsylvania:

". . . . Title III of the bill does not give full and complete insurance against unemployment, but it is the beginning of a fund that will be built up that will furnish sufficient funds for the maintenance of those who will find themselves unemployed, for temporary periods, and I think in the writing of any legislation we are wise in making it temporary periods, for unless we do (and throw down the bars) we will find a great host of our people who will not take a job or work when offered. These are the evils we must guard against. We do not

want to put into effect a dole system that will further break down the morale of our people, but on the contrary make men and women work when an opportunity is afforded to them. The temporary benefits will tide many of the unemployed over until they can find a job. That, as I understand it, is the purpose of the bill. . . . " (Ib. p. 5826)

Mr. Dickstein of New York:

". . . . Our legislation today is record breaking and the statutes we are enacting today will forever lift the specter of want and depression from the shoulders of the American people. We are providing in short for social security, the security of every man and women who is gainfully employed to see to it that they are not caught again in the throes of unemployment, and security provided for old age so that when men and women have passed their prime and are no longer in a position to be gainfully employed, the community should step in and save old age from want. Such in brief are the purposes of the bill, and such in brief are the ideals which this administration wishes to enact into law by way of stabilizing and assuring our people of a fair and honorable living." (Ib. p. 5704)

Mr. Sirovich of New York stated that the Federal Government could assist business, industry and labor by the

"perfection of unemployment insurance in times of prosperity to provide for the unemployed in times of distress.

* * * * *

" . . . . This bill seeks to minimize unemployment by cushioning with unemployment insurance any critical period of unemployment that might afflict us in the future." (Ib. p. 5789)

(1). Adequacy of the Measure

Mr. Doughton:

" . . . . Some think various provisions are too inadequate. I, for one, would far rather start cautiously than to go too far and bring about the collapse of our handiwork in the future. . . . " (Ib. p. 5476)

Mr. Treadway of Massachusetts:

"I might point out that even if the States promptly enact unemployment-insurance laws no benefits could be paid to the unemployed until after a reserve has been built up, and this, of course, would take several years. Even then benefits would be paid for only a few weeks, after a certain waiting period, and with the present number of unemployed the funds would soon be exhausted." (Ib. p. 5529)

Mr. Truax of Ohio:

"Mr. Chairman, I think that they generally admit, as we all do, that this bill does not in any manner or means adequately or satisfactorily solve the problems which we seek to solve. However, we all admit that this is a beginning. We admit that unless more effective provisions, such as increasing the amount of old-age pensions, finding additional sources of revenue, and increasing in the end unemployment compensation, this legislation will eventually fall by its own weight. . . . " (Ib. p. 5688)

Mr. Cooper of Tennessee:

". . . The central purpose of the Federal bill in regard to unemployment compensation is to equalize the financial burden placed upon employers throughout the country and thereby permit States to go ahead." (Ib. p. 5782)

(i). Statements Made in the Senate

Senator Harrison, Chairman of the Committee in charge of the bill, in discussing the unemployment problem said:

"For in normal times, and in fact even in boom years, there is always considerable unemployment. Some 3,000,000 people who wanted work did not obtain it in the comparatively prosperous year of 1928. When machinery is replaced by more efficient machinery, when overproduction arises from any of many causes, when an industry is dying because its product is being supplanted, men are thrown out of work. (Cong. Rec., Vol. 79, Pt. 9, p. 9270)

"Further, with little thought directed toward stabilization, many industries operate with considerable irregularity of employment. There are peak periods and there are low periods, and a plant that employs thousands of men in March and April carries on with merely a skeleton force in the autumn months. The thousands who are thus dropped face a resulting period of unemployment, exhausting, in many instances, their meager savings, and sometimes becoming a charge on charity before an opportunity for regular wages is again afforded them. (Ib.)

"It has always been natural for the cost of this unemployment to fall upon the local community. Those who are out of work first look to their neighbors for help; and, when that source is no longer sufficient, to their local and State governments. Unemployment may, in extraordinary depressions, necessitate the Federal Government assisting the States to meet the problem, but otherwise the problem of so-called 'normal' unemployment is one that primarily is of local concern. (Ib.)

"This has long been recognized by the States, and the problem of meeting this 'normal' unemployment has been the subject of earnest study by commissions estab-

lished by them. Especially has this been true since 1929, when increasing ranks of the unemployed brought the necessity of some action more keenly to public attention. (Ib.)

"It is significant that almost every State commission investigating the subject urged some form of unemployment insurance, and, while differing as to details, uniformly recognized that part or all of the cost should be borne by employers in industry and that reserves should be built up in good times to help in providing for the welfare of those unfortunates cut off from regular work by seasonal unemployment, or that resulting from the many other causes found even in normal times." (Ib.)

Senator Wagner, who with Mr. Lewis of the House, was the author of the bill, discussed "Economic Insecurity as an Indictment of America". He traced social insecurity in its modern aspects from the dawn of the factory era, the increasing shift from farm to city—all beginning with the end of the Civil War. He referred to the economic strength which our energy and genius had built, the extent and efficiency of our mechanical equipment, our resources, fabulous enough to offer a promise against the possibility of adversity, to the enormous wealth which we achieved exceeding the wildest flights of fancy; for all of which we became "the envy and admiration of the universe, and a shining example for the ages yet to come". (Ib. p. 9283)

The Senator's flights of fancy continued. From the material wealth which blessed us a prophet of old would have envisaged the worker freed from the necessity of seeking bread alone, secure against unemployment, working under conditions calling forth creative intelligence, enjoying ample leisure for the cultivation of family life and the enrichment of spiritual outlook. The worker grown old, would spend his

declining days in mellow comfort, neither the charge of charity nor the victim of the bitterness of unrequited efforts. But the prophet awakened in 1922 to face a rude disillusionment. In these matchless years until 1929, he found three million unemployed—twenty million were living in the cold cellars of poverty. Old people relied upon younger relatives. Children were denied the joys of carefree childhood. The inequitable distribution of tremendous wealth "was sharpening the tragic contrast between the House of Have and the House of Want."

The Senator traced his efforts beginning in 1928 to begin a survey of unemployment, for the creation of a nation-wide exchange system, and for the inauguration of a long-range public-works program. In 1930 and 1931 he introduced measures designed to promote federal encouragement of unemployment insurance laws in the several states, similar in ideas to the present bill. They were promptly buried in committee. At his instance a special senatorial investigation of the problems of unemployment insurance was had. A committee of three senators had protracted hearings, the majority deprecating the potentialities of federal action. The Senator filed a minority report urging immediate legislation along the lines of the pending measure.

> "When future historians of the gilded age from which we have emerged seek a moral to adorn their story, they will find that social injustice brought the retribution of sure decline. The income of the masses, shriveled by the blight of wide spread unemployment and uncompensated old age, was not sufficient to buy the goods flowing from the ever expanding factories. The huge profits of the few, which could not be spent in self indulgence, were reinvested again and again in plants and machines. When the market became flooded with unsold surpluses, the depression came with the certainty of nightfall. (Ib.)

"From that emergency we have been rescued by a program combining constructive action with enduring faith in the essential fortitude and strength of the American character. We now seek a new era of well being in which the social inequalities of the past will be driven forever from the scene. We seek a more even tempered and widely diffused economic enjoyment that will provide a bulwark against the resurgence of hard times. The social-security bill draws its inspiration from both of these objectives. It is a compound in which are blended elements of economic wisdom and of social justice. (Ib.)

"UNEMPLOYMENT INSURANCE: LEGISLATIVE PHASE

"At the very hub of social security is the right to have a job. Even in the care-free decade of the nineteen twenties, an average of 1,500,000 workers per year were care-worn and tormented by the visitation of unemployment. Between 1922 and 1933, 15 percent of our total man power remained idle and disdained. When 15,000,000 people walked the streets of despair in early 1933, we knew at last that the fall and rise of our national prosperity kept pace with the rise and fall of unemployment; and we knew that until we solved this baffling enigma, our bravest and sincerest efforts would spend themselves in vain. (Ib.)

"There is no quick relief for unemployment that has reached its zenith, any more than there is a sure cure during the last stages of a malignant disease. But the common experience of many progressive countries has revealed a relatively humane and economical method of alleviating the sporadic or seasonal unemployment which occurs even during normal times. And in addition to its curative aspects, it is a method which serves as a check upon further unemployment. Needless to say, this remedy is unemployment insurance. (Ib.)

"There are many reasons why unemployment insurance in the United States should be developed along State lines. The tremendous expanses of our territory and the infinite variety of our industrial enterprises create totally dissimilar conditions in different parts of the country. Besides, it would be unwise to fit an inflexible straitjacket upon the entire Nation without testing by comparison in operation the two or three major proposals for unemployment insurance, each of which has elements of merit urged by divergent schools of reputable thought. (Ib.).

"At the same time, the disheartening results of 50 years of agitation for unemployment insurance prove conclusively that there will be no substantial action unless the Federal Government plays its part. Less than one-half of 1 percent of the workers in this country are covered by the much-heralded private and voluntary plans for their protection. And so paralyzing has been the fear of unfair competition by backward States that only Wisconsin dared to proceed in splendid isolation by enacting an unemployment-insurance law. The very fact that four other States have taken the same course in the short period of time since the inception of this measure is the best token of the validity of Federal encouragement." (Ib. pp. 9283-84)

Senator McNary entered into an exhaustive analysis of the history of the times, discussing the increase within a hundred years of the expectancy of life from 39 to 60, the advance of the machine age which relegates to the shadows the skilled and elderly artisan; the constantly decreasing population of the farms balancing the increasing urban life; the decrease of families and the advent of labor-saving devices. But the inevitable march of progress compels us to re-adjust our economic life to the new industrialization and mechanical advancement. At present wages the average workman cannot

save enough for old age. "It must be evident to the most determined individualist", said the Senator,

> "that in most instances old-age dependency in the United States is not due to individual maladjustment, but to social and economic forces which the individual cannot hope to govern." (Ib. p. 9542)

Once the magnitude of the problem is clearly recognized, once we face squarely the fact that the problem is no longer the individual's but the nation's to master, "we shall set ourselves to the task of its solution". (Ib.)

Senator Harrison undertook briefly to outline the purposes of the measure. It is designed to meet three major problems: (1) pensions for the aged and blind, (2) provisions for child welfare, and (3) unemployment insurance provisions. (Ib. p. 9267)

Senator Wagner observed that it was obvious that the 3 per cent. payroll tax could not be a panacea for the burden of unemployment such as we have borne in the past. Its protective features would cover only twenty-four million of the forty-eight million gainfully employed. After a waiting period of four weeks the unemployed would receive benefit payments for fifteen weeks, not in excess of $15.00 per week. If the rate of unemployment were the same between 1936 and 1950 as it was between 1925 and 1935, the total wage and salary loss in the covered group of workers would be $75,000,000,000, or three times the sum available for the 3 per cent. payroll tax. (Ib. p. 9284). But this analysis overlooks the purpose and indirect effects of unemployment insurance. It is designed to supplement the public works projects, to provide for intermittent, short term unemployment,

> "a remedy that is more dignified, more humane, more certain, and more economical than emergency relief, with

its inflated ballyhoo and its deflating effect upon the moral stamina of the recipients." (Ib.)

The mere focus of business attentiveness upon the problems of the jobless will tend to prolong work, as the study of life insurance has tended to increase the length of the average life. A provision in the measure requires that the tax rebate shall be used to encourage a close connection between state job-insurance laws and unemployment offices.

The measure permits the employer with a good employment record to offset against the federal tax not only the state tax he has paid but the amount of the reduction he has won. But the bill takes great pains to prevent any state from circumventing the (federal) law by allowing additional credits without setting up adequate safeguards against unemployment. (Ib.)

The Senator discusses the stabilizing effect upon industry which unemployment insurance will have in times of stress. For instance, the 3 per cent. tax would have provided ten billion dollars between 1922 and 1933. It would have produced an accumulative reserve of two billion dollars in 1929, the prompt release of which would have mitigated and abbreviated the down-swing of the business cycle. (Ib.)

Senator Schall of Minnesota noted that beginning January 1, 1936 a payroll tax of 1 per cent. would begin to finance unemployment insurance, which would amount to $200,000,000, which would be doubled in 1937. (Ib. p. 9537)

(2) The Act as a Tax Measure

(a) Messages of the President

In his message of June 8, 1934 the President said that he believed "that the funds necessary to provide this [unemployment and old-age] insurance should be raised by contribution rather than by an increase in general taxation". (Cong. Rec., Vol. 78, Pt. 10, p. 10771)

In his message of January 17, 1935 transmitting the report of the Committee on Economic Security the President said that, with respect to unemployment insurance, he had concluded

> "that the most practical proposal is the levy of a uniform Federal pay-roll tax, 90 percent of which should be allowed as an offset to employers contributing under a compulsory State unemployment-compensation act. . . ." (Cong. Rec., Vol. 79, Pt. 1, p. 599)

(b) The Report of the Committee on Economic Security

The Committee on Economic Security referred frankly to the "tax-credit device" which it preferred to one in which the tax would be wholly collected and then remitted to the states as grants-in-aid; because

> "under the latter system the States would not have self-supporting laws of their own, and as with all compensation having its source in Federal grants there would be great and constant pressure for larger grants exceeding the money raised by the tax, with a consequent confusion of compensation and relief." (Report of the Committee on Economic Security, p. 17)

In making the recommendations as to the "technique" of establishing a Federal-State unemployment system the Committee proceeds in the conviction that its purpose could be most promptly and effectively accomplished by federal legislation which would, among other things, (1) produce uniformity in the burden by levying a payroll tax, (2) stimulate the passage of compensation laws by the states, by allowing a credit against the federal tax for contributions paid under state laws (Ib.). This credit should be allowed only if the state is cooperating with the Federal Government in the administration of unemployment compensation, expending the money raised solely for benefits, and is depositing all contributions as collected in the Unemployment Trust Fund. (Ib. p. 18)

Additional credits are recommended on the reserve account and guaranteed employment account, which finds its place in Section 910 of the Federal Act. (Ib.)

(c) Hearings Before the Committee on Ways and Means of the House

The Committee on Ways and Means (as well as the Committee on Economic Security) had before it the choice of the grant-in-aid system or the Federal-state system. Under the first the Federal Government would collect the entire tax and by grants of 80 to 90 per cent. of the tax subsidize the states to enact measures submitting control in all particulars to the federal authorities.

The national system was put aside apparently with much regret. Mr. Leiserson commented that everybody knew

> "that regulating working conditions has been up to the present always considered a State system." (Hearings before the Committee on Ways and Means, p. 400)

So what appeared to be the lesser of the two evils was adopted (Sections 901, et seq.).

Miss Perkins told the Committee on Ways and Means that the Committee on Economic Security believed that "the device of utilizing the taxing power of the Federal Government", as a method of raising revenue for the government and for encouraging and stimulating the passage of proper and suitable unemployment-insurance laws, was the best scheme, the best method, which the Committee could recommend at the time (Ib. p. 183). Mr. Vinson of Kentucky asked Miss Perkins if the Committee gave any consideration to the matter of securing this money from sources other than payrolls; in answer to which Miss Perkins said that the Committee did consider the matter of securing funds out of general taxation; that a part of the whole system could be financed, if desired, by contributions on the part of the Government, made possible "by increased general taxation, either income, inheritance, or any other form of taxation". (Ib. p. 205) The Committee gave consideration also to the matter of imposing a tax on labor-saving machinery for unemployment insurance, but most of the members decided to abandon such a plan as a practicable theory at the time. "Although theoretically it [such a theory] is a very enticing thing, it is extremely difficult to estimate in advance how much money that would bring in". The actuaries found it impossible to tell in any given year whether a labor-saving machine would be introduced that would put so many thousand men out of work, or whether one would not be introduced in that year but ten years later (Ib.). The Committee was directing its thought toward unemployment insurance and old-age annuities; and

> "in devising the taxes, we tried to indicate these taxes in the spot which would develop the necessary income and

the necessary impetus to the enactment of State laws in the matter of unemployment insurance. (Ib. p. 207)

* * * * *

" . . . With regard to the unemployment insurance, we do not believe that this is an appropriation out of general taxes. The taxes raised by the 3-percent excise tax on pay rolls will not be used to pay unemployment insurance or unemployment benefits." (Ib. p. 208)

The tax recommended

"is not the assessment of a tax out of which benefits will be paid. It is the assessment of a tax on a person who is not paying a premium out of which benefits will be paid." (Ib.)

Mr. Lieserson felt that the objection to the subsidy plan was sound; that the Supreme Court had said in the Child Labor Cases that Congress could not "under the guise of a federal regulation" regulate conditions within the states; a ruling which likewise applies to the attempt of Congress to regulate the industrial relationships within the states (Ib. p. 400). But, Mr. Lieserson hoped:

" . . . . May be they [the Supreme Court] will not hold that now. But I felt, and most of the members of the committee felt, that we cannot jeopardize this step that needs to be taken now on any theoretical argument about what the Supreme Court might do or might not do." (Ib. pp. 400-1)

Mr. Hill, a member of the Committee, adverted to the grant-in-aid system of constructing highways; describing the grant as a pure subsidy arising from general taxes and paid out of the treasury. He added, however, that the subsidy for roads

"does not involve, of course, the question of levying these taxes upon employers or employees to raise the fund." (Ib. p. 413)

Mr. Leiserson replied that the highways could be connected with interstate commerce, whereas it

"would be pretty difficult to connect manufacturing of, let us say, pocketbooks within a State to interstate commerce. (Ib.)

* * * * *

"the Federal law is designed only to collect this tax in order to get the States to enact certain laws— . . . ." (Ib. p. 418)

Mr. Morgenthau, Secretary of the Treasury, recognized that the tax would fall ultimately on the mass of the population, but emphasized that the effect of these taxes is to provide a substitute form of savings

"from which our workers will receive far greater and more assured benefits than from many other forms of savings now in existence. These taxes, in other words, will not be a net deduction from workers' incomes. They will release funds, as well as relieve anxiety, hitherto directed toward the universal problem of providing against one's old age." (Ib. p. 900)

Mr. Morgenthau thought it entirely possible that improvements in the revenue system would permit a reduction of taxes on "consumption goods", thereby returning to the mass of the population in this form

"what is taken from it in the form of pay-roll and earnings taxes." (Ib.)

Senator Hastings, appearing before the Committee, asserted that a method patterned on the road grant-in-aid plan

provided "the only constitutional way in which it [the institution of the unemployment system] can be done"; that he was quite sure in his own mind that "the Federal government cannot [constitutionally] impose this kind of a tax". (Ib. p. 956) But the Senator added, he had not given very careful study to the question of the constitutionality of the tax because his experience in the Senate had led him to believe that it was not worthwhile to argue constitutional questions; if the Senate favors a measure it goes ahead frequently and ignores the question of constitutionality. (Ib. p. 959). But he goes upon the theory that the Federal Government can tax only for governmental purposes; that if it were the primary duty of the government to take care of the unemployed, the Constitution would permit the passage of this measure; but such is not the duty of the Federal Government; it is the primary duty of the state. (Ib.)

Mr. Emery felt that upon a serious examination it would be found that the proposed tax is not a tax at all; it does not give a legal basis for a tax, and that there are very serious objections to an exercise of congressional power of this character for this purpose. (Ib. p. 1020)

Mr. Emery discussed the case of *United States v. One Ford Coupe Automobile*, 272 U. S. 321 (71 L. ed. 279), quoting from the court's opinion that the use of the word "tax" did not prove conclusively that the burden is imposed by the tax. Such is a matter for judicial determination after the legislature has exercised its discretion. He referred to the *Child Labor Tax Case*, 259 U. S. 20 (66 L. ed. 817), *Stafford v. Wallace*, 258 U. S. 495 (66 L. ed. 735), and *Hill v. Wallace*, 259 U. S. 44 (66 L. ed. 822), as authority for the principle that so-called taxes which undertook to regulate the conduct of the states were not in fact taxes. He distinguished

the case of *Florida v. Mellon*, 273 U. S. 12 (71 L. ed. 511), in which the court pointed out that

> "a tax is the compulsory taking of the private property of the citizen for the purpose of the support of the sovereignty or government which levied the tax. That is the test of what constitutes a tax." (Ib. p. 1025)

The difference between the estate tax and the payroll tax is that in the first instance the credit is not dependent on the adoption by the state of a policy proposed by Congress; in the second place, unless the state puts into effect the unemployment plan with its standards fixed by Congress, the taxpayer receives no credit for the state tax. Congress did not enact the estate tax for the purpose of endeavoring to persuade the states to enact a like tax. Only three states in the Union lacked such a tax (Ib. p. 1026). If by the use of the taxing power an attempt is made to impose a penalty or to compel an independent sovereign or individual to pursue a certain line of conduct, if what is done is the endeavor to exercise a forbidden power under the color of a permissive power, the exercise of the latter cannot be sustained. If the federal tax is intended not to raise revenue but to control the local conditions of production, the tax is invalid. The purpose of the tax is not to raise revenue for the Federal Government; for if it were successful in raising revenue the bill would be a failure. The proposed statute therefore, as it is worded, defeats its own purpose.

> "It would be, in this instance, you gentlemen will clearly admit, a complete failure if it succeeded in raising revenue which the Federal Government retained, instead of raising revenue which the State recaptured if it conformed to the requirements imposed by the Federal Government, carrying out the will of Congress, as laid down in legislation. Therefore, I say it is a regulatory statute." (Ib.)

An examination of the legislation piece by piece is convincing that it is upon its face pointed to one result:

> "to secure State legislation upon a subject on which the States have not legislated and which under the tenth amendment is not only under their control but which they are free to accept or reject." (Ib. p. 1027)

And it is here proposed that unless the states act, a tax will be levied upon their citizens which the states cannot recover and which will lessen their taxing power.

> "So, paradoxical as it may seem, the success of this bill depends upon its failure to produce revenue for the Federal Government." (Ib.)

Mr. Emery, in answer to questions from the Committee, stated that in the instance of the estate tax the taxpayer could secure his credit as a result of his own act, while under the present bill no act of the employer could recover his credit, such being dependent entirely upon the act of the state of which he is a citizen (Ib. p. 1029). While the tax (or 10 per cent. thereof, dependent on the action of the states) goes into the federal treasury subject to appropriation for any purpose, the major purpose of the bill according to its title is "a bill to alleviate the hazards of old age, unemployment, illness, and dependency, to establish a social insurance board in the Department of Labor, to raise revenue, and for other purposes", while the minor purpose is revenue (Ib. p. 1030).

(1). Desirability of Placing Tax in Separate Bill

Mr. Green advised that the grant-in-aid plan be adopted so as to lessen the question of constitutionality, asserting that Congress has power to appropriate money

as grants-in-aid for unemployment insurance on such terms as Congress may establish, as it has done in respect to public roads (Ib. p. 389).

Mr. Epstein advised separate bills—one as a tax measure. In the other Congress would say to the legislatures of the states that if they want protection for their people (which the employers do not want but which the governor and the legislature do want); if they adopt a decent bill that will comply with federal standards as to minimum benefits, a "real guarantee of good administration"—if they guarantee that they are going to administer such a system rightly "we will turn over to you the money we collect from your state". (Ib. p. 563). The witness stated that this was "more constitutional . . . . logical and legitimate." The governors and the legislatures will see that the tax is enacted. (Ib. pp. 563-4). His suggestion as to splitting up the measure into two bills is based on the idea that

> "it is safer constitutionally to separate the revenue-raising part from the disbursement part. . . . " (Ib. p. 564).

The witness expressed his willingness to do anything to minimize constitutional problems. From his bitter experience he knew that if the court nullified a social law, a generation is lost trying to change it, as for instance, the child labor amendment (Ib.). By separate bills one step is taken away from constitutional troubles. The entire plan in the same bill would permit the court to say "you set up that tax for a specific purpose", the answer to which would be, if separate bills were provided:

"... 'Why, we set up the tax, that is all. That was just the revenue for the Government, general revenue. We happen to be disbursing an equal sum in a separate bill.' Well, that is another story." (Ib. p. 565)

Dr. Frank P. Graham, Chairman, Advisory Council to the Committee on Economic Security, likewise advocated a tax bill separate from the grant-in-aid type, to avoid the strain of carrying sufficient national standards and other regulations required by the interstate and national nature of industry and employment.

"... Such a joint act more seriously raises the question of constitutionality." (Ib. p. 881)

Senator Hastings undertook to draw a distinction between using general funds for these purposes and laying a special tax for the particular purpose. He did not think the Federal Government could lay a special tax for the purpose of taking care of the unemployed and paying it out of its own funds. If funds are collected for general purposes, they might be used for the purpose of the bill, and the constitutional objection would be lessened; for it is very difficult to raise the question as to the disposition Congress makes of the general funds. At least, the question of levying a tax for a special purpose would be eliminated (Ib. p. 960).

Mr. Leiserson, Chairman, National Mediation Board, called the 3 per cent. tax a premium which is paid for unemployment insurance; for the principle is insurance (Ib. p. 409)

(d). Report of the Committee on Ways and Means of the House

The report states that practically no objections have been made to the imposition of the taxes levied in the bill. Such objections as have been offered overlook the fact that the initial rates are very low (Ib. p. 16). That the tax is imposed on employers is indicative of the conviction that employers should bear at least a part of the cost of unemployment compensation, just as they bear the cost of workman's compensation. (Ib. p. 8)

The views of the minority deserve attention. It is stated that:

> "Titles III and IX taken together provides for what is commonly known as 'unemployment insurance.' The incidental revenue collected under title IX is intended to offset the payments made under title III. (Ib. p. 43)
>
> * * * *
>
> "The best legal talent that the Attorney General's office and the Brain Trust could marshal has for weeks applied itself to the task of trying to bring these titles within constitutional limitations. Their best effort is only a plain circumvention. They have separated the proposition into two titles. This separation is a separation in words only. There is no separation in spirit or intent. These two titles must stand or fall together." (Ib.)

The minority view as to the purpose of the 10 per cent. tax retained by the Government is not different from that of the majority.

(e). Hearings Before the Committee on Finance of the Senate

Miss Perkins stated that all the federal government does is to place an ordinary excise tax upon the payrolls which the employer must pay. He may however offset against that tax up to 90 percent. any contribution he pays under a state compulsory unemployment insurance system. The reason for not offsetting the 100 percent. is to have the 10 percent, remaining for administration; a percentage supported by the experience of other countries (Hearings before Committee on Finance of the Senate, p. 112)

Miss Perkins stated that the state could assess an employer at any rate it wished to fix, different from the rate imposed on other employers, for the reason that "This is not a tax, you see; it is an assessment to a fund." (Ib. p. 125)

Senator Barkley raised an objection to the use of a tax for general government expenses which had been collected for the purpose of unemployment insurance as to which Miss Perkins insisted that the tax was not collected for unemployment insurance; that it is a general tax; that

> " . . . . . It is assumed that the Federal Government has an ample use for taxes and is always seeking new sources of revenue." (Ib. p. 127)

Senator Barkley replied that

> " . . . . . We would not be levying this tax except to provide for unemployment insurance." (Ib.)

In reply Miss Perkins answered that the purpose was to provide general funds for general purposes and "to encourage the states to pass unemployment insurance laws of their own". Senator Barkley pursued his discussion as to the use of this particular tax, levied for the purposes of unemployment insurance, for the support of the army and navy, diplomatic corps or some other normal branch of the federal government, which Miss Perkins countered by saying that it did not matter how this particular money was used, just as it did not matter whether she paid her rent out of her savings bank or her salary. "That is your money," replied Senator Barkley. (Ib.)

Miss Perkins objected to making this a special fund if it were ever to be returned to states for paying unemployment benefits, for each state would be thus encouraged to postpone the passage of its own law. Senator Barkley again inquired if Miss Perkins objected to holding the amount of the tax in a special fund to give the states a chance to pass the required laws, twelve states not having legislatures until 1936, the states complying being entitled to their share of the fund? Miss Perkins answered by saying that 44 states have legislatures in 1935, that the amount will be much smaller as 1 per cent. will probably be substituted for 3 percent. the first year. (Ib. p. 134)

Mr. Green, in discussing the constitutional features, raised the question whether Congress can use its taxing power "to indirectly compel a state to do something"; a question involved in the child labor laws. The plan suggested by Mr. Green therefore would be for the federal government "to prescribe the standard and require the states to conform to that standard. . . . ." (Ib. p. 159)

Dr. Witte: One of the reasons for the low rate of

the old-age tax is that a tax is being imposed for unemployment insurance purposes simultaneously. (Ib. p. 196). If a system of unemployment insurance were devised and its administration vested in the national government, it could not rest on the taxing power alone; the question of the use of the regulation of interstate commerce would arise. But under the plan submitted [which was adopted in substance] the question does not arise. (Ib. p. 223) The money collected by the state is not a tax; it is a contribution or a premium. (Ib. p. 239)

Mr. Leiserson remarked that if we start with the premise that we want to use the principles of insurance, the first question is, how much premium shall we pay for the insurance? The bill provides that there shall be a 3 percent. tax "which really is the premium". (Ib. p. 262)

Mr. Harrington, of Fyffe & Clarke, General Counsel for the Illinois Manufacturers Association, said that the bill involved the equivalent of a general sales tax,—"not for the general purposes of Government, but for special purposes." (Ib. p. 688)

Mr. Reyburn, National Retail Dry Goods Association, disagreed with the Secretary of the Treasury who advocated a payroll tax for the purposes of the bill. Many merchants and others felt the charge to be a proper one against general revenues of the states and nation. (Ib. p. 706)

Professor Paul H. Douglas, Department of Economics, University of Chicago, referring to the few standards to which the state systems were required to conform assumed that this was so as to avoid a declaration of unconstitutionality on the ground that Congress

". . . . . was using the taxing powers for a purpose which was primarily if not exclusively regulatory. . . . . ." (Ib. 892)

Mr. Webster, representing the Connecticut Manufacturers Association, Bridgeport, Conn.: Reduced to their elementals the measures propose by the use of taxing power to achieve by indirection an end that could not be legally accomplished directly. (Ib. p. 897-8)

Mr. Emery, Counsel, National Association of Manufacturers, Washington, D. C.: The very purpose of the legislation upon its face is to compel the legislative action of the states. It is not the purpose of the legislation on its face, to raise revenue for the general government. On the contrary the success of the bill as a revenue raiser would be the defeat of its purpose as social legislation. In no other measure has Congress provided on the face of its tax measure the means of defeating its own revenue. (Ib. 925) If all the states complied with the statute the government would be deprived of the revenue raised by the tax, observed Senator Barkley; with which Mr. Emery agreed, adding that the government would retain ten percent. which on its own calculation would cover the cost of administration. (Ib. p. 927) It is unfortunate, added Senator Barkley, that to induce the states to act, it is necessary to offer an inducement or impose a penalty. (Ib. p. 928)

On the face of the bill, said Mr. Emery, it is obvious that the regulations suggested are not for the purpose, incidentally of assisting in the collection, administration or enforcement of the tax, but that the tax was levied with no intent to secure the revenue but with the major purpose of securing action by the state.

"So as a general conclusion we point out that on the face of this legislation, the success of it as it is written, as its proponents assert, as its terms identify it, all go to the proposition that as a revenue measure it must fail in order to be successful as a social measure. In other words it will fail exactly to the degree contemplated by its proponents if it raises revenue instead of procuring regulation by the States, and thus carries on its own face the means of defeating its own revenue objective." (Ib. p. 930)

Miss Perkins: The reason for not offsetting 100 percent. is to have 10 percent. for administration, which according to the experience of other countries is proper and suitable. The tax that goes into the Treasury is available for appropriation by Congress. There is no advantage to the state in allowing employers merely to pay the federal tax; for the state would then have to pay in the form of relief for distress due to unemployment, or something else. The advantage to the employers will be to have a compulsory unemployment insurance law in every state to which every employer will be contributing. Such funds will be used for regular benefits to the unemployed persons in that state. (Ib. p. 112)

(1). Desirability of Placing Tax in Separate Bill

Mr. Green explaining his grant-in-aid plan, said that the government could collect the tax and put it into the Treasury. Then the states are given to understand that if they pass unemployment insurance legislation which measures up to standards set by Congress, the federal government will subsidize them to the extent of the tax paid by the different states. (Ib. p. 156) The subsidy would be provided by separate and distinct bill. (Ib. p.

157) The difference between the two said Mr. Green, is one of constitutionality. Under the subsidy plan Congress can fix its own standards. Under the federal-state (or tax-credit) plan the state fixes its own standards without any control by Congress. (Ib. p. 158)

In the Report of the Advisory Council to the Committee on Economic Security (Ib. p. 246) the Council recommended the subsidy plan in the belief that it had its advantages (a) in dealing on a nationwide basis with situations crossing state boundaries; (b) in establishing and maintaining throughout this country the essential minimum standards; (c) in removing all obstacles to bringing the reserve funds into federal control; (d) it would run less risk of unconstitutionality than the Wagner-Lewis type when the latter is equally equipped with provisions of minimum standards for the states; (e) the federal control of funds and the power to allow or disallow grants, would be an important element in national control; (f) it would lend itself more readily to developing a national system should that become advisable.

The minority of the Committee favored the Wagner-Lewis type as having the following advantages: (a) It permits experimentation by the states; (b) it secures the equalization of competitive costs; (c) it permits the requirement of all essential uniform standards, such as that the money collected must be spent for unemployment benefits, the custody of the funds, and others; (d) it secures the advantages of federal supervision with decentralization of administration, and local responsibility; (e) it avoids the hazards of an annual appropriation by Congress; (f) it raises substantially the same constitutional questions as the subsidy type of bill, but has the great merit that should it be held

unconstitutional, the state laws would be complete in themselves and would remain operative; (g) it will result in federal and state legislation this winter, while 44 state legislatures are meeting and there is strong public support, which is doubtful under the subsidy plan, particularly if many detailed standards to which the state laws must conform are inserted in the federal act. (Ib. p. 227)

Francis D. Tyson, Professor of Economics, University of Pittsburgh, thought it well from a constitutional standpoint to separate the tax feature from the payment of subsidies. He felt that a larger degree of supervision by the federal government would assure a greater measure of uniformity so as to eliminate the obstacle of competition, which would persist if the states were free to fix their own standards of rates. (Ib. p. 739)

Senator King introduced a memorandum by Professor Paul H. Douglas who felt that the fear of constitutionality could be lessened by the passage of two acts. The power to tax is certain. There are almost no limitations upon the spending powers of Congress. If the system under one bill should be declared unconstitutional he suggested that

> ". . . . . it should be able to run the constitutional gamut if they were put asunder." (Ib. p. 895)

In a joint statement submitted by the Washington Branch of the American Association for Social Security the tax-credit bill was criticized (1) as lacking essential standards, whereas the subsidy plan permitted maintenance of basic standards; (2) as permitting a multiplicity of diverse and uncoordinated state programs; (3) as involving a duplication of tax collecting machinery; (4) as controlling the states only by penalizing the employer

through cancellation of tax credits; (5) for requiring state funds to be turned over to the federal treasury, a requirement with which some states could not constitutionally comply.

Dr. Witte thought the difference between the subsidy system and the tax credit system recommended in the bill not very great. It relates merely to the manner in which the money is brought into the federal treasury. If the state collects, it is not a tax but a contribution or a premium rate. (Ib. p. 239)

(2). The Act Provides "Compensation" Rather Than "Insurance"

Mr. Green thought the plan an insurance measure. (Ib. p. 169) Mr. Leiserson felt that casual labor could not be handled on the principle of insurance, but this principle was most important in respect to the vast majority of wage earners that ordinarily support themselves by labor and their jobs. (Ib. p. 260)

Senator Black insisted that because some one else paid the premium the result was none the less insurance, with which Mr. Leiserson disagreed on the ground that if half the premium came from the higher income brackets the beneficiaries would be taking money from a place where the risk is not located and there would be no reason for distinguishing the different kinds of unemployed people when they are given money in this fashion. (Ib. p. 278-9)

Mr. Elbert, a member of the Unemployment Insurance Committee to the Industrial Advisory Board, felt that unemployment insurance is not a charitable enterprise; it is meant to be and should be, self-supporting.

Who believes it wise to break up the large insurance companies into 48 small companies with separate administrations and varying scales of premiums and benefits? (Ib. p. 830)

Mr. Frederick H. Ecker, President of the Metropolitan Life Insurance Company, felt that the application of insurance principles to the individual risk of unemployment was absolutely hopeless; that the principle of compensation for unemployment within certain limits of time and money is practical and sound. He recommended that the word "insurance" be dropped and "unemployed compensation" be used instead. (Ib. p. 848)

Mr. Marsh, representing the People's Lobby, felt also that "insurance" is a misnomer, for unemployment could not be put on an actuarial basis. The length an individual employer continues in business cannot be relied on, nor can he be held responsible to maintian people if he is bankrupt himself. (Ib. p. 962)

(f). Report of the Committee on Finance of the Senate

The Committee sees nothing "revolutionary in any of the innovations in this bill." Every measure proposed is in accord with the "tried American institutions and traditions." (Senate Report No. 628 p. 28)

The Committee likens the "tax offset device" to the provision in the Federal estate tax law. (Ib. p. 12)

(g). Statements made in the House

Mr. O'Connor, the acting floor leader, said the bill had no privileged status; that while it contained partial

revenue features, it did not come within clause 45 of Rule XI which makes bills raising revenue in order. (Cong. Rec. 79, Pt. 5, p. 5460)

Mr. Jenkins asked why the Rules Committee found it necessary to bring the bill up for consideration under a special rule if the bill were rightly a revenue bill? For a revenue bill properly reported by the Ways and Means Committee is a privileged bill and needs no special rule. (Ib. p. 5684)

Mr. Doughton said that the Social Security Act was one of the most important measures ever placed before Congress for its consideration. While it is designed to enhance the security of the American worker and to provide a larger measure of social justice, it does so within the scope of our economic order. He challenges anyone to say that insurance against these social dangers is contrary to our institutions, or that it will undermine the integrity of the American system. (Ib. p. 5468) If the federal government were to go further and take over the entire problem of old age pensions it would be contrary to our fundamental political institutions and would place upon the federal government a tremendous financial burden "without the protection of local vigilance which will prevail if local taxpayers are required to bear part of the cost." Our constitutional limitations prevent us from setting up a national system of old-age insurance, which is unquestionably the best basis. (Ib. p. 5470)

In discussing Title IX Mr. Doughton related the annual rates of the tax, the credit allowed employers, said that a "few minimum requirements" are imposed which state plans must satisfy in order to qualify for credit, the principal one being that the fund shall be one solely for

the payment of unemployment benefits; that "In general, the states are left free to determine the provisions of their unemployment-insurance laws, the scale of benefits which they pay, and the other features." (Ib. pp. 5475-6)

The discussion of the measure as a tax measure now centers around Title II providing for federal old age benefits, and Title VIII, imposing a tax with respect to employment. There was little discussion in the House under this head as to the unemployment compensation features (Titles III and IX). The trend of debate as to TITLES II and VIII may therefore be applied to TITLES III and IX; for the plan of separating appropriations from taxes is the same in respect to the subjects, both of old-age pensions and unemployment compensation, and the taxes sought to be imposed for these purposes. Mr. Treadway, as he had repeatedly done in committee hearings, attacked Titles II and VIII as setting up an old-age retirement system based on reserves imposed on industry under the guise of a tax. (Ib. p. 5530) He charged that "The federal government has no express or inherent power under the Constitution to set up such a scheme as is proposed"; that the administration and the Democratic majority of the Committee had been working for months trying to give Titles II and VIII some color of constitutionality. "They are not very proud of their handiwork, but they think it is in the least objectionable form from the constitutional standpoint." (Ib. p. 5530)

Mr. Jenkins said that the government is being put into the insurance business on a tremendous scale; that in the Ways and Means Committee the proponents had done their best to remove the unconstitutional features of the measure, "but they have failed". (Ib. p. 5682) He

called attention to the fact that the majority report of the Ways and Means Committee says not a word about the constitutionality of Titles II and VIII. (Ib. p. 5682)

Mr. Robsion was advised that many lawyers on the Ways and Means Committee and other lawyers were inclined to think the bill unconstitutional as it was then before the House; that if given an opportunity he would vote to strike this provision from the bill and have it re-referred to the proper committee for further study and preparation, so that the House might have a better bill before it. (Ib. p. 5696)

Mr. Harlan argued at length that the separation between Titles II and VIII preserved both; that there is no precedent under which the courts could declare Title II unconstitutional; that it would be a futile act to provide funds from the general treasury to carry out Title II and later re-enact Title VIII with no physical connection with the Social Security Act. He supported the doctrine that if states could not administer necessary regulations (as they cannot do with unemployment relief), and that if this function was neither expressly excluded from the regulating power of the federal government nor expressly restricted to the states, it was the duty of the federal government to assume control as being the only agency capable of protecting those rights which the Constitution reserved to the people. (Ib. p. 5700)

Mr. Monaghan of Montana asserted that the Supreme Court would read and interpret the bill in its entirety and according to the language found therein. (Ib. p. 5701)

Mr. Cox of Georgia said that the thing that disturbed him was that apparently all thought in Washington had

been directed toward centralization of government, and most of what has and is being done apparently is intended to produce that result. (Ib. p. 5780)

Mr. Reed of New York:

"The provisions have been cut, carved, sawed, assembled, and reassembled in an effort to make it constitutionally presentable to the Supreme Court. A resort has finally been had to an ingenious mechanical arrangement of title II and title VIII as the most likely means of diverting the attention of the Supreme Court from the real issue, viz, that these two titles are the same in purpose, spirit, intent and substance. This clever scheme may succeed, but I do not believe this mechanical subterfuge will deceive the Court. If the purpose sought to be accomplished does escape the scrutiny of the Court because of the mere juggling of titles, then other police powers reserved to the States may in the same manner be taken over and operated by the Federal Government without let or hindrance. (Cong. Rec. Vol. 79, Pt. 6, p. 5891)

* * * *

"The best legal talent the administration has been able to engage from the departments and elsewhere has endeavored to so frame title II, change its title, distort it, and put the tax features in title VIII, to mislead and deceive, if possible, the Supreme Court of the United States. I stated yesterday, and I state again today, that the members of the committee in their conscience know that title II and title VIII are unconstitutional. They know they are trying to set up as a Federal activity a police power that is reserved to the States." (Ib. p. 5991)

Mr. Huddleston of Alabama:

> "Mr. Chairman, unusual as the practice is in these times, I wish to make an appeal to reason and to logic. This bill provides for a system of State aid for which there is no warrant in the Constitution and which can be sustained, as the Supreme Court has decided in the Massachusetts case, merely because there is nobody eligible to call it in question. It provides for a system of old-age pensions for which there is no warrant in the Constitution, and upon the soundness of which men of ability and character might well find themselves in radical difference." (Ib. p. 5983)

Mr. Treadway charged that Titles II and VIII are just as closely related as a house and its foundation. Neither is intended to stand by itself. The money raised by the tax is not intended for the support of the government, but to pay the benefits provided under Title II to the same employees who are taxed under Title VIII. He calls attention to the fact that the report of the majority makes no reference to the connection between Titles II and VIII because they

> "know that the Supreme Court is eventually going to look at that report to see what the intention of Congress was in setting up these titles. They purposely omitted any reference to the connection between the two, because they wanted to try to delude the Supreme Court. I do not think the Court is going to be deceived, however. It is not going to let Congress do in a backhanded way what it cannot do directly." (Ib. p. 5530)

Mr. Jenkins referred to the brief of the Attorney General, which he said appeared nowhere in the record in the proceedings of the Committee; nor did the long speeches

consuming nearly two days by representatives of the Attorney General's office. (Ib. p. 5683) Mr. Jenkins lamented the fact that the Attorney General did not in his brief give both sides of the question, saying that the latter was not justified in taking a partial position.[1]

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1 Mr. Cooper introduced the Attorney General's brief in the record. It erroneously appears as a part of his remarks. The brief begins on page 5782 of Congressional Record, Vol. 79, Part 5, column 2, line 27, beginning "The purpose of this memorandum," and ending on page 5784, column 2, line 42, the last paragraph being "It follows hence that those Titles of the bill," etc.

The brief of the Attorney General cites familiar cases; but they are not applicable to this situation. In each one the power to tax is not disputed. *Veazie Bank v. Fenno*, 75 U. S. (8 Wall), 533 (19 L. ed. 482), imposed a tax of ten per cent on the amount of notes of any state bank paid out by any banking association, but this tax the Court said was " . . . in the exercise of undisputed constitutional powers . . ." [549 (488)] Likewise in *McCray v. United States*, 195 U. S. 27 (49 L. ed. 78), it was undisputed that the tax on oleomargarine "was within a power conferred . . ." [54 (95)] With a prophesy which is marked the Court said that if a case were presented where the abuse of the taxing power was so extreme as to be beyond the principles stated in this case, and where it was plain to the judicial mind that the power had been called into play

> "not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred . . ." [64 (99)]

In *Billings v. United States*, 232 U. S. 261 (58 L. ed. 596), it was not seriously denied in argument that the tax levied was intended to be an excise tax upon foreign built yachts. [279 (604-5)] In *Brushaber v. Union Pacific RR Co.*, 240 U. S. 1 (60 L. ed. 493), the power of Congress to impose an income tax was not questioned; it was the progressive feature of the tax which was attacked. [25 (504)] *United States v. Doremus*, 249 U. S. 86 (63 L. ed. 493), turned on the undisputed power of Congress to select the subjects of taxation and, as the power to impose the excise tax was not questioned, the Court stated that it could not look into the motives of Congress to ascertain what may impel the exercise of the taxing power. [93 (496)]

". . . If the legislation is within the taxing power of Congress—that is sufficient to sustain it . . ." [94 (496)]

In *Massachusetts v. Mellon*, 262 U. S. 447 (67 L. ed. 1078), the statute under attack "imposes no obligation, but simply extends an option which the state is

Mr. Knutson said that the tax (for annuities) was not for the purpose of providing revenue for the federal government but simply an enforced contribution for the benefit of a certain class of persons. (Ib. p. 5543)

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free to accept or reject . . ." [480 (1082)]. The distinction between the Maternity Act and the Federal Act now before the Court is obvious. Appellants here do not sue merely as taxpayers as did Frothingham. [485 (1084)]. Appellants occupy the position in which the Supreme Court found the processing taxpayer when it afforded him relief.

Florida v. Mellon, 273 U. S. 12 (71 L. ed. 511), likewise raises no question as to the power of Congress to impose a tax on inheritances [17 (514-15)], a field which it may constitutionally occupy irrespective of the result on the finances of the states.

The Attorney General ignores entirely the principle that in *A. Magnano Company v. Hamilton*, 292 U. S. 40 (78 L. ed. 1109), involving a tax on butter substitutes imposed by a state legislature, the tax was "a tax of a kind within the reach of its lawful power . . ." [44 (1114)].

The advice of the Attorney General to the committee: That if Congress would separate the tax from the appropriation no one could raise the question and it would be "reasonably safe to assume that the social security bill, if enacted into law, will probably be upheld as constitutional" (Con. Rec. Vol 79, Pt. 5, p. 5784) is answered by the case of *United States v. Butler*, 297 U. S. 1 (80 L. ed. 477). In that case the argument was made by the government that the Court could look at the Agricultural Adjustment Act as two separate laws: One imposing a tax and the other appropriating the money; and that from this view neither could be attacked. As to this the Court said that the sole object of the legislation was to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers who would reduce their acreage for the accomplishment of the proposed end, and, meanwhile, to aid these farmers during the period required to bring the prices of their crops to the desired level; that in this plan of regulation the tax plays an indispensable part.

> " . . . . Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment.
>
> "The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. . . . 58 (484)
>
> "The statute not only avows an aim foreign to the procurement of rev-

(h) Statements made in the Senate

Senator Wagner, the author of the bill, said:

"Viewed in isolation, there can be no doubt that all of the excise taxes embodied in the social-security bill are a valid exercise of congressional power. The only serious question is whether they may be set aside on the ground that their real intent is to stimulate social insurance laws by the several States, or that they form part of a designing Federal scheme to invade the provinces reserved for State action. But no constitutional principle is more firmly embedded in case law than that no concomitant motive will invalidate an otherwise valid exercise of the taxing power. . . . . (Cong. Rec. Vol. 79, Pt. 9, p. 9287)

"The further objection may be raised that the excise tax and the income tax levied by section 8 are in-

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enue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production." 59 (485)

In its brief in the case of *United States v. Constantine*, 296 U. S. 287 (80 L. ed. 233), the Government undertook as it does here to distinguish the penalty imposed (Revenue Act of 1926, 44 Stat. 9, 95, Sec. 701) for the sale of liquors in a state where the same was forbidden, from the *Child Labor Tax Case* and *Hill v. Wallace*. It cited *United States v. Doremus* and quoted at length from the Court's opinion, including that part wherein the Court states that the fact that other motives may impel the exercise of the taxing power does not authorize the courts to inquire into that subject. (Brief of the United States, pp. 40-45). But in answer to that argument the Court said:

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State." [296 (239)].

valid because the measure taken as a whole indicates rather strongly that these taxes may be used to defray the costs of the special benefits to workers retiring at the age of 65. While the Supreme Court has not decided this question, the constitutionality of the Agricultural Adjustment Act, which went much further by directing that the proceeds of the taxes provided for therein should be devoted to specific purposes elaborated in the same act, was maintained by Judge Brewster of the United States District Court for Massachusetts. In the case of Franklin Process Co. against Hoosac Mills Corporation, located at page 552 of the eighth volume of the Federal Supplement, we read: (Ib.)

"The act, taken as a whole leaves no doubt of the legislative intent to levy the tax for the purposes of defraying the expenses of administering the act and paying the debts incurred for benefit payments. * * * If * * * it should appear on the face of the act that it was calculated to benefit only private interests, it would be the duty of the court, I take it, to declare the tax unlawful. It is not, however, within the province of the court to substitute its judgment for that of Congress upon the effect of a particular measure manifestly designed to promote the general welfare of the people of the United States. It is no objection that individuals will derive profit from the consummation of the legislative policy. Individuals benefit from every bounty, subsidy, or pension provided for by statute, whether Federal or State." (Ib.)[1]

Senator George raised the question that the act is not intended to raise revenue, but it is intended to furnish a support to the old age annuity and unemployment sections of the bill, in answer to which Senator Wagner said that

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1 The theory relied on by Senator Wagner was rejected when this case reached the Supreme Court. *United States v. Butler*, 297 U. S. 1 (80 L. ed. 477).

the rule that if the measure presented a proper exercise of the taxing power of Congress some other purpose which it may serve would not affect its constitutionality. (Ib. p. 9517)

Mr. Barkley said that his contention was that whenever we establish an old age pension system for everybody we will have to pay for it by general taxation. We cannot levy a tax on Ford Motor Company to pay old age pensions to its own employees and also to the Presbyterian minister and the school teacher. So whenever we decide to pension everybody who is over sixty-five years of age we must levy a general tax on everybody subject to the tax. (Ib. p. 9528)

Senator King adverted to the decision in the Railroad Retirement case and the claim that due to the fact that the act related to the power of Congress to regulate interstate commerce and not to the power of Congress to levy taxes, it was not an authority on this measure. He stated that the argument was also advanced in the Child Labor Tax Case and asked if the Senate wished to go around the circle? That in view of the Railroad Retirement decision, and the Child Labor Tax Case, how could it be said that Congress could provide pension plans for employees under the taxing clause? (Ib. p. 9536)

(3) The Act as Coercing the States

We have undertaken to set out in Appendix A a comparison of the model unemployment compensation acts provided by federal agencies for use by the states, with the forty-two state acts now in effect. A careful examination of the latter reveals that the state acts generally follow the model acts with precision, with only occasional and unsubstantial de-

partures. The laws of thirty-five states[1] provide that if TITLE IX, or in some instances if the Federal Act, is declared invalid the laws of such states shall be no longer operative. The laws of five states[2] provide that in such circumstances the funds arising in such states shall be returned to the states respectively for disposition under the laws thereof.

In its brief in the case of *Davis v. Boston and Maine Railroad,* 17 Fed. Supp. 97, the Government argued that the tax levied under TITLE IX, increases rather than decreases, the freedom of state action, pointing out that in ten states "bills proposing similar laws were defeated in the legislatures" (p. 56). These ten states were named:

~~Colorado~~, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, Pennsylvania, Vermont and Virginia.

The contention, therefore, argued the Government, that the states were coerced to enact the legislation, was unsound. We would assume that the Government would now be driven from this argument since all these states except Illinois and Ne-

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[1] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts (with certain limitations), Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia

[2] Maryland, New Jersey, North Carolina, Pennsylvania, Wyoming

braska have changed their perspective and enacted such laws (see Appendix A).

(a). Messages of the President

In his message to Congress of June 8, 1934, the President stated (p. 7) that he believed there should be a maximum of cooperation between states and the federal government, that social insurance should be national in scope, although the several states should meet at least a large portion of the cost of management, leaving to the federal government the responsibility of investing, maintaining and safeguarding the funds constituting the necessary insurance reserves. (Cong. Rec. Vol. 78, Pt. 10, p, 10771)

In his later message of January 17, 1935, the President said that he had concluded that the most practical proposal is the levy of the federal tax with the 90 percent. credit feature; the purpose being to afford a requirement of a reasonably uniform character for all states cooperating with the federal government and to promote and encourage the passage of unemployment compensation laws in the states; the 10 percent. not offset being used for federal and state administration of this "broad system". (Cong. Rec. Vol. 79, Pt. 1, p. 599)

(b). Report of the Committee on Economic Security

It was recognized that in several respects state administration might develop marked inadequacies. It was recommended that the Federal Act expressly provide that all states must include in their statutes a provision for repeal and amendment, so as to avoid any "vested interest" resulting thereunder, so that Congress could at any time increase the requirements which state laws must fulfill. (Re-

port p. 16) On account of the danger of competition from the industries of other states, few such state laws will be enacted. The obstacle to state action can be removed through the imposition of a uniform federal tax, with an offset permitted to any employer who contributes under a compulsory state law. This it is thought "will encourage the speedy enactment of state laws which meet minimum standards of security and fairness". (Ib.) The Committee further recommends that central control of reserve funds should be allowed so as to prevent their operating toward instability. A "tax-credit device" was preferred to a grant-in-aid, because under the latter system the states would not have self-supporting laws of their own. (Ib. p. 17) The credit should be permitted

> "only if the State is cooperating with the Federal Government in the administration of unemployment compensation, expending the money raised solely for benefits, and is depositing all contributions as collected in an unemployment trust fund in the United States Treasury, as hereafter recommended." (Ib. p. 18)

Additional credits would be allowed to employers having reserve or guaranteed-employment accounts "only on the condition that the employer has discharged in full his obligation under the State law and continues to pay at least 1 percent. into the pooled state fund." The employer with the individual reserve account must maintain a reserve equal to 15 percent. of his payroll, and with the guaranteed employment account, a reserve of 7½ per cent. of his payroll; and the state law must have been in operation five years. (Ib. p. 18)

The federal government should grant the states sufficient money for proper administration, "under condi-

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tions designed to insure competence and probity." Selection of personnel on a merit basis is vital to success. The grant for administration would be paid for by the 10 percent. against which no credit is allowed. (Ib.pp.18-19)

(c). Hearings before the Committee on Ways and Means of the House

Dr. Witte set forth the requirements in the bill imposed on the states as the condition of the credits. In these there is no substantial change from the law as enacted, except as to the amount of the tax-rate. Among other requirements is that all contributions imposed by the state are to be spent in the state, which removes all necessity of inserting any standards regarding benefit provisions or anything of that sort. (Ib. p. 137)

Dr. Witte referred to the fact that Governor Lehman of New York regarded as bill number 1 the measure proposed in the legislature of that state, for the enactment of which he will push "as soon as he knows what will be required". (Ib. p. 143) Ninety-eight percent. of the 10 percent. of the tax goes to the states for administration. (Ib. p. 147) In a model state bill "that we are preparing, we are putting in a clause saying that the states may depart therefrom." (Ib. p. 149) If there should be state laws that are utterly unfair, "we have a club here; we won't give them the administration fund, and they won't be able to administer the law at all unless they dig down into their own pockets to pay the administration costs. . . ." (Ib p. 154)

Miss Perkins felt that the federal-state system was the most practical at this time. (Ib. p. 183) Credits are al-

lowed up to 90 percent., only for the purpose of providing a ten per cent. fund for administration. It is proposed that this 10 percent. be given back to the states. (Ib. pp. 183-4) It had been thought wise [it is presumed, by the Committee] "to permit the States to determine under their laws who shall contribute to the fund." (Ib. p. 185)

Mr. McCormack, in questioning Miss Lenroot (Chief of the Children's Bureau, Department of Labor) drew from her the admission that unless the state submits an unemployment compensation plan that meets with the approval of "somebody in Washington," then the plan can be disapproved. (Ib. p. 286)

Mr. Hansen: The amount withheld (the 10 per cent.) will be used for the purpose of subsidizing or giving a grant-in-aid to the state employment offices and building up the standards of administration of the various states. (Ib. p. 380)

Mr. Green, discussing the grant-in-aid policy, observed that out of the moneys collected the United States "would subsidize the states", provided the latter enacted unemployment insurance measures containing the minimum standards established by Congress. (Ib. p. 388) In answer to a question, why the money should not be given direct to the beneficiary, Mr. Green said that "we have 48 sovereigns here. It cannot be done any other way. The states must enact the unemployment-insurance acts." The federal government must provide for the pool plan. It must not be left to the states, to adopt a hit-and-miss plan, like workman's compensation laws. If Congress sets up standards which should be uniform in their application, each state will respond and incorporate in its law simple standards providing, (1) a waiting period of a

week, (2) a pool-reserve fund, (3) a limit of 26 weeks. These simple standards can be set up by Congress in order to enable the states to receive a subsidy out of the federal treasury. In Great Britain all funds are pooled, but our 48 sovereignties make that "a little difficult." (Ib. p. 389) If Congress fails to establish standards the states "must conform to", it will be found that in states "where our liberal forces are not strong, where social-minded people are not so numerous, where they do not possess a social conscience, they will adopt an unemployment-insurance measure providing for the payment of the most meager sums and those "liberal forces in the state will be unable to prevent it." But if Congress says that the benefits must be fifty per cent. of earnings, not to exceed $15 a week, and if that must be put in the law in order to secure the subsidy from the federal government, the state legislature will so provide. That is the only way to get uniformity. (Ib. p. 396)

Mr. Leiserson felt that better progress would be made if "we let those states which are ready to act now begin and enact their own laws under the general authority" of the Wagner-Lewis bill. It is advisable to let each state begin administering this kind of an act and begin to collect the data on which an actuarial calculation for that state alone can be made. (Ib. p. 401)

Mr. Leiserson protested that instead of imposing a standard on the States of a 3 per cent. tax on the employer, the States ought to be allowed to split it as in Ohio: Two per cent. from the employer and 1 per cent. from the employee. He did not think it wise, because "you and I think that it is not the wise thing to do, to impose standards here in Congress that will force the States to

follow our ideas rather than their own ideas on the subject. They ought to be allowed that measure of self-government as long as all the money that is collected will go to the employees in the end. (Ib. p. 402) . . . . I would not like to see Congress at this time lay down a rule that would compel the States to act just one way and not another way." (Ib. p. 403) The federal tax should be imposed on all states so that the employer in the state that fails to pass a law "cannot chisel on the State that is going forward." (Ib. p. 408)

The purpose of the bill is, very frankly, to lead employers in a state to establish such a law, since they have to pay the tax anyway, so as to avoid this paying of the tax (except the 10 per cent.) and moving of the people to States where the system is in effect. (Ib. p. 418) This would be an inducement to every state to provide such a system of unemployment insurance.

Mr. Lewis, questioning Miss Christman (representing the National Women's Trade Union League of Washington, D. C.) who was objecting to the lack of further standards, asked if she thought the states would set a tax at less than three per cent., then proposed in the bill, when otherwise the tax would stay in the federal treasury, to which the witness replied "Well, I would like to be sure of it. . . . I think they [the more laggard states] need Federal guidance." (Ib. p. 794)

Mr. Ellenbogen felt that the tax device proposed would not in some states provide sufficient pressure to bring about the enactment of unemployment compensation systems. (Ib. p. 822)

The Report of the Technical Board on the Major Alternative Plans for the Administration of Unemploy-

ment Insurance compares the three proposed systems, (1) the national system, in which the federal government administers the entire plan, (2) the federal-state system or the subsidy plan, where the government collects all the taxes and subsidizes the states, and (3) the federal-state system or the credit plan, where the federal government retains only ten per cent. of the tax for use for administrative purposes. As to which of these plans should be adopted should be "decided primarily on practical and fundamental policy considerations, rather than on the issue of constitutionality." (Ib. p. 875) Under the third plan, if the states should pass laws and the federal act be held unconstitutional the state laws would continue to operate; while under the subsidy plan, the state administration would fail without a federal appropraton. (Ib. p. 876)

The Report of the Advisory Council to the Committee on Economic Security recommends the grant-in-aid system in a bill separate from the tax bill; the bill providing that no state is to receive aid until its law is in effect, and containing any other feasible provisions "designed to stimulate prompt state action." This plan would run less risk of unconstitutionality than the plan adopted, if the latter were "equally equipped with provisions of minimum standards for the States." (Ib. p. 883) It is recommended that wide latitude be allowed to states with regard to rate of benefits, ratio of weeks of benefit to weeks of employment, and length of waiting period; provided the states satisfy the federal administrative authority that there is reasonable prospect that they will be able to maintain payment of benefits on the basis prescribed in their law; no law to be approved which provides a waiting period of not less than two nor more than four weeks, and

prescribes a rate of benefits of not less than 50 per cent. of weekly wage not in excess of $15 per week. Actual payment of benefits should not begin until two years after the act becomes effective. The length of the probationary period of the unemployed before obtaining benefits should be left to the states. (Ib. p. 886) The federal board should have the responsibility of passing upon state laws and their administration and of certifying to the treasurer their compliance with the Federal act. (Ib. p. 887)

The Committee recommends that the Committee on Economic Security frame model state bills "incorporating the various types of legislation permitted under the federal act, and be prepared upon request, to provide actuarial and expert assistance in the drafting of bills for introduction in the several state legislatures." (Ib. p. 888)[1]

Senator Hastings remarked that "the clear purpose of the act [containing the tax-credit device] is to compel the states to adopt some plan of unemployment compensation. If the state does not adopt such plan, the tax paid by the employer goes into the general fund of the federal treasury." (Ib. p. 951)

> "I cannot see how, under our Federal Constitution, we can levy a special tax upon the people of the various states, when its sole purpose is merely to compel the states to enact, for the benefit of the people of such state, the kind of law that the Federal Congress believes to be for their benefit. (Ib. p. 951)
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> ". . . . I think the question of the necessity and the desirability of such a law should be left to the legislature and the executive of each state. (Ib.)

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1 See Appendix for comparative analysis of draft bills with the laws passed by the states.

". . . . We have never heretofore, so far as I know, attempted to compel a state to adopt any particular kind of law believed by the Federal Congress to be desirable or necessary. The adoption of this act thus takes us into an entirely new field. (Ib.)

* * * *

". . . . I insist that the State ought not to be compelled to adopt a particular kind of a tax in order to prevent the tax that the Federal Government has laid upon it being taken out of the State." (Ib. p. 961)

The one argument in favor of the measure that in the Senator's judgment was sound "economically", was that the federal tax eliminated the question of competition among the states. (Ib. p. 961) The argument does not, however, overcome the constitutional objection (Ib. pp. 961-2), which nothing can overcome. (Ib. p. 962) The senator's remedy for the problem is through governors' conferences and compacts among states. The latter would then request Congress to approve the compact. He knew of no state requesting legislation, except New York according to "last night's paper." (Ib. p. 962) The states would hasten to enact their laws if they were required to pay the 3 per cent. federal tax anyhow, which would be spent elsewhere, and the Senator objected to "our forcing them to hasten to do it." (Ib. p. 963) The employer would invite the state government to levy the state tax, since the employer has to pay the federal tax anyway. (Ib. pp. 963-4) That is the only way the state can save the tax for itself. (Ib. p. 965)

M. B. Folsom, assistant treasurer, Eastman Kodak Company, member of the Advisory Council on Economic Security, favored the plan of experimenting with several

state systems; for if a federal system were adopted we could experiment with only one plan, which would not suit the whole country with conditions so different in the various sections. (Ib. pp. 1001-2)

Mr. Emery, representing the National Association of Manufacturers, felt that the problem could be approached in another way, if the federal government would leave the states free to act and assist them financially without endeavoring "to undertake to compel them to adopt a policy which seemed good to it [the federal government] as a condition of receiving temporary assistance. . . ." (Ib. p. 1032)

(d). Report of the Ways and Means Committee of the House of Representatives

It is noted that Titles III and IX seek to encourage states to set up unemployment compensation systems and "to keep them from being handicapped if they do so." (House Report No. 615, p. 7) A uniform nation-wide tax upon industry, removing the objection of competition as between industries in different states, is necessary before states can go ahead and pass this socially desirable legislation.

> "This is one of the purposes of Title IX of this bill. In this title a tax is imposed upon employers throughout the country against which a credit is allowed of up to 90 per cent of the tax for contributions made by employers to unemployment compensation funds established pursuant to State law." (Ib. p. 8)

The standards (as to state legislation) prescribed in the bill "are designed merely to insure that employers will receive credit against the federal pay-roll tax only for pay-

ments made under genuine unemployment compensation laws." (Ib. pp. 8-9)

(e). Hearings Before the Committee on Finance of the Senate

Senator Wagner discussed the features of the subsidy grant-in-aid plan, the chief objection to which was that the states would not stand upon their own feet but would exert increasing pressure to secure contributions larger than the sums raised by the federal tax, thus mingling the insurance with relief, a most unsatisfactory method. (Hearings before Committee on Finance of the Senate, p. 4). As a substitute, however, "as a more powerful incentive", the bill presented the tax-credit feature, the natural result of which would be the enactment of laws in every state, "since the states will be anxious to draw this federal tax back into their own borders. . . ." (Ib.) The tax will put all states on a parity, "so that if a State refuses to pass a law it hasn't that advantage gained by a low standard. That is the purpose of the act". (Ib. p. 22)

Senator Black brought out from Senator Wagner that if the state desired to raise its benefits through some other method of taxation, as by correcting the "maldistribution of income", it would not be permitted to do so under the bill as framed, and secure federal aid and credit on federal taxes; that the funds intended for state administration come from the 10 per cent. retained by the federal government. (Ib. pp. 23-24)

Miss Perkins explained that the 10 per cent. of the federal tax for which no credit was allowed was for administration. There is no advantage to the state in allowing employers merely to pay the federal tax, for the

state would still have its unemployment burden to meet. The advantage to the state would come from passing such a law, for the funds contributed could be used for regular benefits to the unemployed persons within that state. (Ib. p. 112). Miss Perkins did not think that the states should be cut off from any experimentation they wanted to give to various aspects of the problem [of collecting contributions by use of a pooled fund rather than plant reserve funds]; provided the federal government assures itself that the funds received are properly taken care of and are used for the benefit of the unemployed. The Committee has several alternative model bills, which can be drawn with reference to the methods of contribution. (Ib. p. 115)

Senator Black brought out that except for administration the state had no funds to expend except from the funds raised in such state (Ib. p. 120); that the state could not substitute excess profits or any other tax for the contribution exacted of employers (and employees); that (except for the claimed precedent of the inheritance tax credit plan) there is no precedent (which Miss Perkins could at the moment think of) for this "system of federal aid, we will call it, or Federal coercion—that is what it amounts to, so far as I am concerned." (Ib. p. 122)

Senator Barkley asked for Miss Perkins' theory as to the justification for this "form of coercion or intimidation or whatever it is". He is a little bothered about the theory that Congress can say to a state "If you do not pass a law yourself we are going to take it away from you, and you do not get any of it back." (Ib. p. 126) If the money is returned, she answered, for unemployment relief, the incentive for the state to pass a suitable law is removed; the purpose of the federal law being to equalize

in the states the cost of doing business in every state so far as possible with regard to taking care of unemployed persons. She was opposed to the suggestion of Senator Barkley to earmark the funds until the states should pass proper laws, for if the states were to get the funds back anyhow the inducement or incentive to pass such laws would be removed. (Ib.)

Senator Barkley found a serious objection to the collection of a tax for a definite purpose, like unemployment insurance, and then using a considerable portion of the tax for general government expenses (Ib. pp. 126-7), as to which Miss Perkins answered that the tax was a general tax for which it is assumed the government had ample use and was always seeking new sources of revenue (Ib. p. 127). Senator Barkley replied that the tax would not be levied except to provide for unemployment insurance. Miss Perkins answered that the tax is levied to raise funds for general purposes "and to encourage the states to pass unemployment insurance laws of their own" (Ib.).

"Senator Barkley. And penalize them if they do not?

"Secretary Perkins. It only penalizes the employers, not the State generally.

"Senator Barkley. It does not penalize the Government.

"Senator Couzens (of Michigan). In other words, if this was earmarked to go back to the States at some future time, there would be no incentive for the States to hurry and create an unemployment-insurance law.

"Secretary Perkins. That is my thought, sir. (Ib.)

* * * *

"Senator Barkley. I think the fund ought not to be dissipated for general purposes; it ought to be kept intact for unemployment insurance.

"Secretary Perkins. It might be kept intact in a fund from which the Government will draw to pay, for instance, for public works, which it is anticipated will have to be thrown in to provide a work benefit after the tax benefits have been exhausted in periods of deep depression. I am told by the Treasury that things like that are merely a bookkeeping procedure. If the Government has an obligation it has to pay the obligation, and whether you have earmarked the fund or not does not matter." (Ib.)

Miss Perkins did not object to permitting the states to benefit whose legislatures did not meet before January 1, 1936, except that the plan should be so safeguarded

"that it is not an encouragement to a State to postpone its action, or to believe that it will get the money back. In that case it will not pass the law and the funds will not be accumulated as they ought to accumulate for the benefit of the unemployed."[1] (Ib. pp. 134-5)

Mr. Green expressed the thought that (as to the grant-in-aid system) the United States with the money could better bargain with the states wanting the money, which means that "the States must meet the standards set by Congress in order to get the money." (Ib. p. 159). There is a question as to whether Congress can use its taxing power "to indirectly compel a state to do something". (Ib.) But there is nothing new in the plan to impose a tax in one bill, and provide an appropriation in

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1 See also Senator Barkley's discussion with Mr. Reyburn on Ib. pp. 709-10.

another on such terms as Congress may impose. Such a plan avoids experimentation which may be "both dangerous and unconstitutional". (Ib. p. 163)

In the Report of the Advisory Council to the Committee (dated December 18, 1934) the majority recommended the two bill plan for the reason, among others, that it ran less risk of unconstitutionality as compared with the credit device bill "when the latter is equally equipped with provisions of minimum standards for the States". (Ib. p. 227). The minority felt that if the credit-device bill were declared invalid, the state laws would be complete in themselves and would remain operative. (Ib.). States should have freedom to substitute their own benefit provisions for the standard benefit recommended, provided they satisfy the federal authority that there is a reasonable prospect that they will be able to maintain payment of benefits on the basis prescribed in their laws. But in no event is a state tax to be approved unless it has a waiting period of not less than two nor more than four weeks, and prescribes a weekly benefit of not less than 50 per cent. of average weekly earnings, and a maximum benefit of at least $15 per week. (Ib. p. 230). The Committee recommended that the state law provide, in substance, what was finally adopted (Ib. pp. 226-31).

Dr. Witte said the word "subsidy" was a misnomer. It relates not to a grant by the federal government from the general revenues, but it relates "to the return of the taxes collected from a state from the 3 percent tax in this bill to the state from which collected." (Ib. p. 239). Under the tax credit plan the money the state collects is not a tax; it is a contribution or premium rate. (Ib.) Credits are withheld until the state complies, as to which Senator Connally said:

"Of course, it is designed to coerce the States into coming in".

Dr. Witte replied that

"You can use that phrase if you want to".

So Senator Connally changed the word to "induce". (Ib. pp. 239-40) On account of the objection of competition, the states have declined to act. Now the federal government imposes conditions which make it of advantage to the states to come in. (Ib. p. 241)

"Senator Connally. Whether you use the word 'induce' or 'coerce' the result is the same. The State says, 'Well, we are going to pay the 3 per cent. tax anyway, or the Government is going to take it away from us, so we will pass it ourselves.' That is the philosophy of the bill?

"Mr. Witte. The philosophy of the bill is to make it possible for the States to act." (Ib.)

Mr. Leiserson, discussing Mr. Green's preference for the grant-in-aid plan, said that some of the standards proposed under such plan would not be acceptable to all the states—Massachusetts, for instance, and he thought Massachusetts would rather lose its 3 per cent. tax than to accept the standards, although he agreed that the act of turning such tax over to the federal government is

"a power or a force which you hold over the head of the people of the State of Massachusetts and would be a very substantial money loss to them if they did not pass the law.". (Ib. p. 277)

Mr. Leiserson stated that Mr. Alexander Holtzoff, a representative of the Attorney General's office who was

on the Technical Board of the Committee on Economic Security, prepared a brief on the subject. [1] (Ib. p. 280)

Mr. Epstein favored the grant-in-aid plan, for the states would adopt the standards proposed by Congress; they had all to gain and nothing to lose. (Ib. pp. 468-9, 497-8)

Mr. Story, Vice President and General Counsel of Allis-Chalmers Manufacturing Company, Milwaukee, asked the Committee to show liberality toward Wisconsin and permit it to carry out the experiment it had begun, and not require a certain percentage as a contribution into a pool fund. (Ib. p. 521)

Mr. Folsom insisted that some freedom be left to the states, as for instance, Wisconsin which had begun its experiment without a pool fund. (Ib. pp. 563-4)

A preliminary draft of a state law was presented by Dr. Witte which contains the following advisory suggestions:

> "Each State which passes such a law promptly will be able to set up a State unemployment-compensation fund, thus using for State purposes that money which would otherwise be paid into the Federal Treasury by the State's employers. (Ib. p. 591)
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> "It is suggested, however, that each State executive or legislator who plans to make any change in either of the model bills (prepared by the Committee on Economic Security) might do well to write the Committee for advice on the vital question: 'Would

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1 Supra, p. 96, footnote 1.

the proposed change prevent the State law from qualifying for (a) Federal tax credits to employers, and (b) Federal aid for State administration?'

"By thus writing the Committee on Economic Security, each State can be advised whether the proposed changes (a) will meet Federal requirements and (b) are consistent, or conflict with other provisions of the 'model bill' itself.

"The Committee's address is 1734 New York Avenue, Washington, D. C." (Ib. p. 592) [1]

Elmer F. Andrews, State Industrial Commissioner of New York, requested the Committee to reduce to one year the time within which benefits are forbidden to be paid, so as to preserve a like provision in the New York law (Ib. p. 717). This the Committee declined to do and New York changed its bill so as to comply (Laws 1935, Chapter 468, Sec. 503.2). The New York law was in the making. At the direction of Governor Lehman Mr. Andrews appeared before the Senate Committee with amendments to bring the Federal Act more nearly in line with the New York bill. These amendments were: (1) to eliminate the provision of the act fixing the rate of contribution on the adjusted index of industrial production averages (Section 601, p. 34 of the bill as introduced) (Ib. p. 714) and to provide a rate of tax at a fixed percentage, (Ib. pp. 714-5); (2) to limit the amount of money distributed to any state for administration so that the amount based on additional need of financial assistance should not exceed ten per cent. of the total allotment to be made to that state, (Ib. p. 715); (3) to eliminate bonuses and to include tips or gratuities as part of

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[1] See Appendix for comparative analysis of model bills with the laws passed by the states.

wages (Ib. p. 717); (4) to eliminate any system except a statewide pooling system (Ib. p 717); (5) to permit benefits to be paid within one year after the enactment of the state law (Ib. p. 717); (6) to enforce a minimum standard of benefit (Ib. p. 718); (7) to apply the contribution to one who had employed four or more persons at any time in any three months period, or such shorter accounting period as the state agency may establish (Ib. p. 718); (8) to exempt farm labor (Ib. p. 719); (9) to limit to twenty-five hundred dollars the salaries on which contributions should be made (Ib. p. 719); (10) to amend the federal bankruptcy act so as to provide a priority status for contributions due from insolvent employers (Ib pp. 720-21). The Committee accepted amendments (1) and (8).

Mr. Filene of William Filene's Sons Company, Boston, stressed the necessity of state experimentation, saying that under the bill it was made impossible for the state to set up its own system unless it desires a system after the pattern of that proposed in the bill (Ib. p. 821).

According to the Report of the Unemployment Insurance Committee to Industrial Advisory Board the purpose of the bill is to encourage state action. All states will naturally pass an unemployment insurance law merely to keep the money at home, if nothing else (Ib. p. 857).

Mr. Hooker, President Hooker Electro-Chemical Co., New York City, representing the Manufacturing Chemists Association, said the bill as framed practically forces the states to adopt the pooled plan. If they comply they cannot experiment with other types of unemployment compensation (Ib. p. 882).

Prof. Paul H. Douglas, Department of Economics, University of Chicago, thought a greater degree of control could

be exercised by the federal government through the distribution for administrative purposes of the 10 per cent. of the tax which it retains, to be withheld if the states do not conform to proper standards of personnel (Ib. p. 893). A state could not substitute other methods of taxation (Ib. pp. 893-4).

Mr. Webster, representing The Connecticut Manufacturers Association, Bridgeport, Conn., felt that the people of his state had theretofore shown the ability to handle their affairs, and viewed with disquiet the attempt of the federal government to direct them along a path of action which their legislators,

> "closer to their constituencies and more familiar with our limitations, have not seen fit to launch upon as yet." (Ib. p. 898)

The industrial employers are concerned about the latent powers of federal coercion that lie in the bill. (Ib.)

Mr. Kellogg, Editor The Survey and Survey Graphic, and Vice Chairman Advisory Council, Committee on Economic Security, New York, felt that to turn back the tax to the states without setting the standards below which no state should go is to make a hollow shell of the protection for which the money is collected (Ib. p. 904).

If the 3 per cent. tax were not sufficient Mr. Kellogg would compel the states to raise the funds in some other manner (Ib. pp. 906-7).

Mr. Sargent, representing The National Association of Manufacturers: The bill apparently allows the state to have pooled or reserve funds, but in fact coerces it into creating pooled funds by providing that employers shall not receive credit for favorable employment records unless the state has

such pooled funds. He urged that each state be fully and actually allowed to determine for itself whether it desires to establish a pooled fund, an industry reserve plan, or a company reserve plan as the basis of the law (Ib. pp. 958-9).

Dr. Eveline M. Burns, Columbia University, said that it is hoped the states would hasten to set up schemes in order to get back their share of the tax paid by their employers and to obtain their share of the $49,000,000 grant for administration (Ib. pp. 1007-8).

Miss Abbott, Editor Social Service Review and Professor of Public Welfare, University of Chicago: The present form of the bill will supply the need, which is pressure at the present time on the states to enact unemployment-compensation laws, and standards can be added as they need to be added (Ib. p. 1081).

George B. Chandler, representing the Ohio Chamber of Commerce, protested against the coercion of the states as represented by the assessment on payrolls and in other ways (Ib. p. 1102).

Henry E. Jackson, President Social Engineering Institute, preferred the grant-in-aid bill, and felt that the apparent courtesy of the tax credit device was a meaningless formality to the states, because it proceeds to take almost every bit of freedom from the states (Ib. pp. 1111, 1126). He preferred a federal tax, the percentage of which is of small importance, because it is designed not to produce revenue but solely for compulsory purposes; the tax to be automatically cancelled as to the employer when its employees shall have adopted a social security plan, with appropriate yields and benefits (Ib. p. 1127).

(f). Report of the Committee on Finance of the Senate

After H. R. 7260 had been passed by the House on April 19, the Committee reported it out eliminating the requirement thate state contributions be confined to the pooled type, which will "permit states to enact whatever type of unemployment compensation law they desire." (Senate Report No. 628, p. 3). The Committee inserted two new sections (909 and 910) allowing additional credits to employers as a reward for favorable employment experience, designed "to permit states to give an incentive to employers to stabilize employment." (Ib.) The bill seeks to "stimulate" the states to set up their systems. The objective is carried out through grants-in-aid to the states (Title III) for administration, and the imposition of a uniform payroll tax on employers with the tax credit device (Title IX). (Ib. p. 12) The conditions under which state laws are approved by the federal board are "intended merely to make certain that the states actually have unemployment compensation laws, rather than mere relief measures". (Ib. p. 12). No state can gain any advantage by failing to establish a system. The interest throughout the country is such that it is to be expected that nearly all states will enact such laws "within a very short time". The states may or may not add employee contributions to those required from the employers. They may likewise determine their own rates, waiting periods, and maximum duration of benefits. (Ib. p. 13). The Committee deemed it desirable to permit the states freedom of choice as to pooled or other funds, with the recognition of credit for employers who have "regularized their employment . . . " (Ib. p. 14). The Committee analyzes Section 903 (a) setting out requirements if a state law be approved. (Ib. pp. 46-7)

(g). Statements Made in the House

Mr. Doughton, in explaining TITLE IX, stated that a few minimum requirements are imposed which the state laws must satisfy in order to qualify for the tax credit, indicating that the principal requirement was that the fund should be used solely for the payment of unemployment benefits. In general the states are left free to determine the provisions of the unemployment insurance laws (Cong. Rec. Vol. 79, Pt. 5, pp. 5475-6); that the federal bill "does not provide for unemployment insurance but merely makes it possible for the states to do so. . . . " (Ib. p. 5476)

Mr. Treadway, of the minority, said that the coercion effected by TITLES III and IX took two forms; under TITLE III the states could not secure their administrative expenses unless their laws met standards laid down in the bill; and under TITLE IX the coercion "in the guise of a tax was more direct." . . . If the state did not pass the law employers located therein nevertheless must pay the full federal tax and get no unemployment benefits; that the only way they could escape the major portion of the federal tax was "by prevailing upon their state legislature to enact such a law. . . ." In effect, TITLE IX forces employers to pay a tax either to the federal government or to the state. (Ib. p. 5529)

"Moreover", said Mr. Treadway,

> "there is a constitutional question involved, since the tax under title IX is not a true tax, but a legislative 'club' to force State action along certain lines." (Ib.)

Mr. Plumley of Vermont referred to the admission contained in the Report of the Committee on Economic Security that its recommendations are "frankly experimental"; that

the plan, according to the Committee, is one that will secure the much needed experience necessary for the development of a more nearly perfect system; yet the Committee urges haste and experimentation. (Ib. p. 5705)

Mr. Cooper of Tennessee took the position that there was no coercion; rather that TITLE IX will have the effect of enabling the states to proceed with their own laws which they have heretofore been unable to do because of the element of competition with the industries of other states (Ib. p. 5781); the bill enables the state to enact these laws which, as a practical proposition, they have heretofore been unable to do (Ib. p. 5782).

Mr. Vinson of Kentucky outlined the requirements imposed on the states before they could qualify under the bill, and these as contained in Section 303 (a) of the bill are substantially as finally enacted. Mr. Vinson stated that these measures are designed to encourage the states to act; that the uniform federal tax will remove the principal objection (Ib. pp. 5900-1).

Mr. Ellenbogen of Pennsylvania stated that as a result of the enactment of the state law the tax will be paid for the benefit of the employees in the state enacting the law; that in other states the tax will likewise be paid,

> "but the employees of such a State will derive no benefit from the tax payments, since they will go into the general funds of the Federal Government." (Ib. p. 5975)

Mr. Burdick of North Dakota characterized the act as

> "the most brazen attempt to submerge the sovereignty of State governments to the will of the General Government ever attempted in American history. Every State is compelled to pass laws such as will be approved

by the board in control of payments under this act. Had any such attempt been made in 1861 to do the same thing this Government would not be known to the world today as the United States of America. Today we see the sovereign power of States disappearing entirely and the Federal Government reaching out in all directions to control the destiny of the American people. Why have any State legislature at all, if they must pass such laws as Congress and the executive branch of the Government shall direct? When will this tendency to overshadow State governments cease?" (Ib. p. 5555)

Mr. Reed of New York, describing the effect of the tax-credit device, said that in such a case "it is not a tax but a penalty, and, therefore, discriminatory as well". (Ib. p. 5892) He stated further that the purpose of the tax was to force the states to enact such laws.

"Mr. Huddleston (of Alabama). Does the gentleman think that such a measure as this which coerces and bribes the State into a system of Federal aid is conducive to the dual form of government? You are destroying our governmental system.

"Mr. Doughton (of North Carolina.) Oh, I make the point of order, Mr. Chairman, that the gentleman from Alabama is out of order.

"Mr Sabath (of Illinois). This is encouragement to the State.

"Mr. Huddleston. What we are doing is to wipe out State lines. We are centralizing all of the powers here in Washington. We are trying to destroy our dual system of government. That is what is the matter with this measure. (Cong. Rec. Vol. 79, Pt. 6, p. 5982)

* * * *

"One member replied that not to require contributions from the States would tend to destroy our system of

government. What, I ask him, could have more influence toward the destruction of our duality of government than an offer to the legislatures of the States a bribe of a grant of Federal Funds to do a thing that they perhaps otherwise would not do? (Applause). What greater force to destroy our form of government can be offered than for the Federal Government to coerce, through a measure such as this, the States into establishing a pension system which they otherwise might not want to do?" (Ib. p. 5983)

Mr. Knutson said that the purpose of the bill was not to "induce" the states to set up systems of unemployment relief, but to "coerce" them. "There is a distinction between the two words". (Ib. p. 5541)

(h). Statements Made in the Senate

Senator Harrison referred to the factor of competition as having heretofore deterred states from establishing such a system, and for this reason it has been considered

> " a most desirable step for the Federal Government to eliminate this barrier to State legislation." (Cong. Rec. Vol. 79, Pt. 9, p. 9271)

The Senator explained that the federal tax placed all employers on the same footing and allowed and encouraged the inauguration of state systems. (Ib.)

Mr. Wagner of New York spoke of the "two powerful Federal incentives to State action" which the bill set out; these being the appropriation for administration of the state system and the credit on the federal tax which the employer under such system secured. (Ib. p. 9284). The Senator justified the tax-credit on the authority of *Florida v. Mellon,* 273 U. S. 12 (71 L. ed. 511). He entered into a discussion

of the opinion of the Supreme Court in the Railroad Retirement case recently handed down (May 6, 1935), and argued that in the present bill the power exercised was derived not from the commerce power but from the power to tax and to spend. He explained the opinion of the court as to the invalidity of the arrangement to pool the funds of the railroads by saying that in that case the benefits were to be paid for past services, but that the present bill applies to the future only. (Ib. pp. 9287-8). He took up the question of *Mountain Timber Co. v. Washington*, 243 U. S. 219 (61 L. ed. 685) and undertook to justify the present bill on the basis of the workmen's compensation decisions. (Ib. p. 9288)

The Senator ended with the peroration that the bill embraces objectives that have driven their appeals to the conscience and intelligence of the entire nation; that among other things the duty rests on Congress to

> "tear down the house of misery in which dwell the unemployed. . . ." (Ib.)

(4) The Act as an Invasion of the Reserved Powers of the States

This subject is to a large extent covered under the subjects entitled "History and Evils of the Times", supra, pages 17 et seq., "The Act as a Tax Measure", pages 71 et seq., and "The Act as Coercing the States", pages 100 et seq. The discussions which deal expressly with the invasion of reserved powers indicate the thought on the part of those who raised the subject that such an invasion was not without its constitutional problems.

(a). *Message of the President*

In the message of the President dated January 17, 1935, he touched indirectly on this question when he said that

> "in order to encourage the stabilization of private employment Federal legislation should not foreclose the States from establishing means for inducing industries to afford an even greater stabilization of employment." (Cong. Rec. Vol. 79, Pt. 1, p. 599)

Thus it was the presidential view that the states would be left room for moving forward with their own plans though the federal government proposed to pre-empt much of the space which had theretofore been occupied by the local solution of the unemployment problem.

(b). Hearings before the Committee on Ways and Means of the House

Senator Hastings, appearing before the Committee, refers to the new policy contained in the Act of placing on the federal government a large portion of the expense of taking care of those in need of public assistance, which had theretofore been borne by the states, except in unusual circumstances, especially in earthquakes and floods, where the federal government has frequently rendered temporary aid (Hearings before the Committee on Ways and Means of the House, p. 947). In answer to a question from a member of the Committee the Senator thought that it was "universally agreed" that the duty of taking care of the needy and unemployed rested primarily on the states, based

> "on the theory that the States withheld all their powers that they did not give up to the Federal Government, and kept for themselves not only the duty but the re-

sponsibility of taking care of their own people. That has been the history of this country. We never heard of a Federal almshouse. The Federal Government has never gone into any of that, except upon the theory that it was to take care of persons for our national defense. We take care of our old soldiers. That is all that we have ever done up to this time. It has always been considered and never has been disputed that these questions are primarily duties of the communities where the people live.

"Mr. Hill. That is because the States heretofore have been measurably able to take care of those situations.

"Senator Hastings. That is true." (Ib. p. 959)

Mr. Folsom in a statement filed by him said that he had heard summed up the argument against the proposed federal system, and the compelling argument against it is that

"it is almost impossible for any group to devise one plan which would be workable or desirable for the whole country with conditions so different in the various sections. . . . ." (Ib. pp. 1001-2)

Mr. Emery:

"As you examine this legislation piece by piece—and, of course, the repeated statements of its proponents makes it practically unnecessary—you perceive again and again that the whole legislation, upon its face, is pointed to one result, and that is to secure State legislation upon a subject on which the States have not legislated and which under the tenth amendment is not only under their control but which they are free to accept or reject." (Ib. pp. 1026-7)

(c). Hearings before the Committee on Finance of the Senate

Dr. Witte referred to a brief by Joseph P. Chamberlain of Columbia University on the constitutionality of the old-age pension assistance bill which is found in the Hearings before the Senate Committee on Pensions of the 71st Congress, 3rd Session, considering Senate Bill 3257, at pp. 99-101. Dr. Witte introduced the opinion (Hearings before the Committee on Finance of the Senate, pp. 92-4) in which Mr. Chamberlain referred to the class of congressional acts extending aid to the states, such as highway, maternity and infancy welfare, industrial and commercial rehabilitation; invoked that part of the opinion in *Massachusetts v. Mellon* as to a lack of power on the part of the court to adjudicate "abstract questions of political power" [262 U. S. 447, 484, 485 (67 L. ed. 1078, 1084)], the court pointing out that no state rights were invaded merely by extending the option. From this authority the author draws the conclusion that the statutes referred to and the old-age assistance bill drawn on their pattern "seem therefore to be free from possibility of attack in an action by a state or by an individual taxpayer" (Ib. p. 93). Mr. Chamberlain points out also that if the conditions in the Act involved cession of reserved powers, the Act would not be unconstitutional, because it did not become effective until accepted by the state, and that the delegation by the state to the United States of some reserved power is no violation of the federal Constitution; that the Tenth Amendment is inapplicable as a test of delegated powers of the United States and cannot be taken to limit the exercise of the delegated powers, in particular the powers of taxation and appropriation.

Interference with the power of the states is no constitutional criterion of the powers of Congress, argued Mr. Chamberlain. If the power is not given, Congress may not exercise it. If given, the laws and constitutions of the states fall before its exercise. The state's acceptance would, at most, violate only the state's constitution and would raise no question within the jurisdiction of the federal courts. No federal aid legislation had so far involved delegation of state powers precedent to receiving benefits, and the same would be true of the proposed old-age law (of 1931). [This law however is quite different from the proposed Social Security Act, which requires the delegation of powers prior to the acceptance of benefits.—Section 303(a)].

It would thus seem that an easy method for Congress to assume powers not delegated to it is to secure them from a state; for by the argument advanced the Tenth Amendment protects the state against Congress but not against itself and the act of the state in exending the power to Congress is no violation of the federal Constitution! Mr. Chamberlain's theory would throw considerable doubt on the principle that has not heretofore been challenged: That Congress can exercise only powers delegated to it by the Constitution. He would now have it exercise powers delegated to it by a single state. Thus the Constitution is amended by one state instead of thirty-six. Thus Congress is free to interfere with the powers of a state if the state accepts the offer which effects the interference, for only the state constitution would be violated (Ib. p. 93).

The author discusses the general welfare clause, discards Madison's theory and adheres to the views of Hamilton and Story: That the expenditure be general and not local (Ib. pp. 93-4). He says in summary that an act would be "free

from attack", and would be no invasion of state rights to local self-government; that the appropriation "would probably not be reviewed by the courts." Thus he reaches the same conclusion which is put forward by the attorney general (supra, p. 96): That if the tax act and the appropriation act are separated no one is left with a justiciable cause and neither act can be tested in the courts.

As far as the state is concerned, there is no doubt that it has the power and the duty to take care of its indigent people, said Senator Gore, "but it is a new theory as far as the Federal Government is concerned." (Ib. p. 133)

Labor legislation is in effect in foreign countries with unitary governments and which do not have "forty-eight sovereignties." Because the latter in this country have such different conditions it is difficult to provide a single plan; "but we should establish as great a uniformity as possible," said Mr. Green (Ib. p. 186).

In an extended discussion between Mr. Epstein and the members of the Committee he brought out that the "approach" would have to be toward "a national way without interfering with our present form of government." (Ib. p. 468) The Congress would say to the state legislature that if the latter adopts a proper law under proper standards (at least a number of weeks and a minimum amount of benefits, and a decent administration) Congress will turn over to the state all the money it has collected through the 3 per cent. tax [changed to the present rates of 1, 2 and 3 per cent., Section 901] and all the state has to do is disburse it under proper standards (Ib. pp. 468-9).

Mr. Peckham, representing the Sentinels of the Republic, referred to the work of this organization in assisting in the movement relating to the repeal of the Maternity Act,

cited its objections to the entire Social Security Act with its highly complex and experimental schemes "covering the same fields of purely local legislation" (Ib. p. 679). As accomplishments by the states he cited the abolition of child labor, adoption of workmen's compensation laws, improvement in public health and educational service, "all under state legislation and administration and at the expense of the respective communities". All these fields of state action "involve private right and domestic problems, and were wisely withheld by the founders from Federal control".

> " . . . . The proposed Federal legislation is designed to be permanent, and if enacted will work a permanent and unwholesome dislocation of our scheme of government." (Ib. p. 679)

Dr. McCormack, Commissioner, State Board of Health of Kentucky, supported the plan proposed. He had found fine cooperation from these [public health] bureaus of the government. Very rarely is there a temporary conflict with them. He annually submitted his plans and found "wise and considerate advisers in those with whom we came in contact". They would make suggestions and issued no orders except in one or two instances, where they should have done so (Ib. pp. 689-90).

Senator Capper observed that there was no reason why the states should be alarmed at anything in the bill, as to which Mr. Tyson said: "Not in the least. They have the very broadest powers" (Ib. p. 738). Here we have the remarkable picture of Congress extending the very broadest powers to the states!

Mr. Emery referred to the hearings before a Senate Committee in 1932, consisting of Senators Wagner, Glenn and Hebert. This was under Senate Resolution 483, the

Report being Senate Report 964, June 20, 1932. Senator Wagner's views are contained in Senate Report 629. The Majority Report (by Messrs Glenn and Hebert) contains the following:

> "The subject of unemployment insurance is not within the sphere of congressional action.
>
> * * * *
>
> "2. Unemployment insurance or wage reserves to be successful, should be inaugurated under compulsory State legislation and be supervised by State authority." (Ib. p. 923)

(d). Statements Made in the House of Representatives

Mr. Reed said that the tax imposed by TITLE IX was another payroll tax; that the system was a state function as distinguished from a federal function (Cong. Rec. Vol. 79, Pt. 6, p. 5892); that the members of the Committee on Ways and Means knew that they were trying to set up as a federal activity a police power reserved to the states (Ib. p. 5891).

Mr. Doughton, in charge of the bill, while not admitting that the bill invaded the reserved powers of the states, explained in words that can mean nothing else:

> "Social insurance quite justifiably places on industry itself a part of the burden of unemployment. Under suitable legislation, industry can and will be encouraged to go far toward stabilization and regularization of employment. . . . . (Ib. Pt. 5, p. 5468)
>
> * * * * *
>
> " . . . . It places part of the financial burden upon industry, and in that way provides an incentive for stabilization of employment. . . . " (Ib. p. 5476)

In prior years some industries have provided their own pension systems. This has never before been regarded as anything but local and subject to state regulation. No one suggested that such a system was valid merely because Congress had not entered the field. Yet according to Mr. Treadway, "the majority . . . . will not show any consideration for the corporations that have their own systems of pensions. . . . ." (Ib. p. 5533)

> "Mr. Robsion of Kentucky. What will become of the tremendous sum that the workers in years past have put into these various annuity funds?
>
> "Mr. Treadway. There are two features, as I understand it. The first proposition is, they could liquidate, if it was an agreement between the employer and the employee. The other proposition is that if large corporations have insured their employees through an insurance company, those policies could be canceled.
>
> "Mr. Robsion of Kentucky. But there are contracts. How do you get rid of those contracts?
>
> "Mr. Treadway. I hope I made it plain that I am not defending that proposition whatever. I am only trying to explain it a little bit." (Ib.)

(e). Statements Made in the Senate

Senator George, discussing both the old-age and unemployment features of the bill, invited attention to the rights enforceable at law which are granted private citizens,

> "irrespective of the character of their employment, irrespective of the character of the industry in which employed, in every State in the Union; and that, in my judgment, clearly shows that an effort is here made to establish a system which does not lie within the powers granted to the Congress, but which have been definitely reserved to the States under the reserved rights and

powers of the State. (Cong. Rec. Vol. 79, Pt. 9, p. 9514)

* * * * *

" . . . . If the scheme is one that can be referred to any legitimate power of the Congress, all well and good; but if it cannot be, and if it is one that must depend rightfully and rightly upon the exercise of the reserved powers of the States, then Congress should not through the compulsion of a tax undertake to compel the adoption of the scheme." (Ib. p. 9516)

Mr. King, discussing TITLE VIII, contended that Congress lacked the power to set up a system of compulsory old-age annuities. He cited *United States v. Knight*, 166 U. S. 1 (39 L. ed. 325), as holding that "the power of a state to protect the life, health, and property of its citizens is a power not surrendered to the Federal Government and is essentially exclusive to the State." (Ib. p. 9526)

Here we have Congress undertaking to protect the economic condition of the citizen and at the expense of another.

Senator Wagner pictured the benefits to industry—the incentive to the retirement of superannuated workers will improve efficiency standards, will make new places for the strong and eager and will increase the productivity of the young by removing from their shoulders the uneven burden of caring for the old; that the purchasing power resulting from the flood of benefit payments "will have an incalculable effect upon the maintenance of industrial stability" (Ib. p. 9286).

(5) The Act as a Denial of Due Process

(a). Hearings before the Committee on Ways and Means of the House

Mr. Hill suggested to Dr. Witte that the failure to tax all employers might raise a question of constitutionality, referred to the Railroad Retirement Case, and asked if it were valid to have one kind of tax for railroad employees and another kind for others; as to which Dr. Witte replied that the Retirement Act had been held invalid as not authorized under the Commerce Clause, while if it had been passed under the taxing power it would have been valid (Hearings before the Committee on Ways and Means, p. 106). Dr. Witte described the additional credits an employer may secure based on his good record

> "because he has stabilized his employment, because he has cut down his unemployment, and has built up an adequate reserve fund." (Ib. p. 138)

Merit ratings are available to employers also, allowing the credits in addition to the taxes actually paid (Ib. p. 139). But these are deferred until experiences are built over a period of five years (Ib. p. 144). While this in a sense destroys the element of uniformity it is being done for the definite purpose of encouraging employers to stabilize their employment—to reduce unemployment if they can. It gives the employer an incentive to which to look forward in reducing his unemployment to the maximum degree possible (Ib. pp. 145-6). "As in all other types of insurance we should try to measure the risk." In time the federal government may impose different rates on different industries; but our experience is not yet sufficient to guide us. The employer who gets the added

benefit is probably making a larger contribution in keeping his employees at work. This credit is available through pursuing the policy, for instance, of distributing work in slack times. This tax does depart from the rule of uniformity but the employer is meeting another cost when he stabilizes his business (Ib. p. 146).

Mr. Cooper could see an opportunity in the course of time "for considerable special favors being granted in this very system here." (Ib. p. 147)

Dr. Witte said that the provision for additional credit was clearly severable, and its elimination would not affect the constitutionality of the Act (Ib. p. 151). The credit is authorized by authority of *Florida v. Mellon*—"Whether you can allow an additional credit of the amount not paid is a difficult question, I grant you," said Dr. Witte (Ib. p. 151).

Mr. Jolly appeared for the hospitals and secured an exemption for them. He said that non-profit hospitals had payrolls just like other hospitals (Ib. p. 431).

Mr. Epstein urged that the cost of collecting from farmers, servants, small storekeepers and others would be twice as much as the amount collected (Ib. p. 559). The Act could not be administered if it included these groups (Ib. p. 571).

Mr. Morgenthau said that if domestic servants, agricultural workers and transients were included, the task of administration would prove insuperable (Ib. pp. 901-2); that of these there are seven million. The bill now embraces twenty million (Ib. p. 910).

(b). Hearings before the Committee on Finance of the Senate

Senator Wagner stressed the encouragement offered industry to enable the latter to reach the goal of stabilization (Hearings before the Committee on Finance of the Senate, p. 4).

It was Miss Perkins' opinion that under the proposed bill the states could tax one industry three percent. and another industry across the street four percent. (Ib. p. 125).

The figure of four employees [as originally provided when the bill was before the Committee and now changed to eight—Section 907 (a)] is an arbitrary number said Dr. Witte (Ib. p. 218). It is quite common in workmen's compensation acts. Administrative problems become very great when an attempt is made to eliminate all numerical limitations (Ib. p. 218).

> " . . . . The number of employers to be dealt with is enormously increased when you include all of the small employers, without increasing the number of employees anywhere near the same proportion. The Census does not distinguish between how many employers there are with four or more, but it gives figures as to the number of employers who have more than five. Eighty-five percent of all retail establishments employ five or less employees, but they have only 25 percent. of the total number of employees in the retail establishments." (Ib. pp. 218-19)

The question is one of balancing complete coverage against the administrative difficulties that develop (Ib. p. 219). There are enough serious administrative problems to cope with in the first years of the Act without trying to include all employers (Ib.) The classification of workmen's

compensation laws has been sustained by the courts of the states (Ib. p. 223).

Senator Couzens inquired of Dr. Witte:

> " . . . . If you are going to exempt one class of employers under this act how can you defend your position that this is an equal taxation?" (Ib.)

as to which Dr. Witte answered that the question is whether the classification is reasonable; that an exclusion of a group from which less money would be collected than the cost of collection would be reasonable (Ib. p. 224).

The tax is computed on the entire payroll in order to avoid examining the payroll in detail for exceptions—to secure ease of administration (Ib. p. 244).

Mr. Jolly, representing the hospitals of the country, said that all hospital employees should secure benefits but should not be taxed. These are exempted under conditions [Sec. 907 (a) (7)] (Ib. p. 258).

Mr. Leiserson said that it was desirable to use the principle of insurance for as many of the unemployed as possible; it is not possible to use such principle as to all the unemployed (Ib. p. 259). Casual labor cannot be handled on the principle of insurance, but this principle will take in a majority of wage earners who suffer from unemployment (Ib. p. 260). He saw no particular reason why the railroads should be exempted (Ib. p. 270).[1] He saw no reason why employees of federal agencies engaged in private businesses, such as barge lines and electric light plants, should not be covered by the

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1 Section 906 provides that no person shall be relieved from making payments under a state law on the ground that he is engaged in interstate commerce.

measure, if the business were of a permanent nature and not an emergency (Ib. pp. 270-1).

Senator Harrison could see some unfairness in not imposing a tax on such activities competing with private business (Ib. p. 271).

If one industry has a large amount of unemployment it ought to pay more because it is a part of its cost. The moment one considers income or paying capacity one is getting away from the principle of insurance (Ib. pp. 274-5).

Mr. Huggins appeared for various denominational bodies to ask that organizations be exempted which maintain pension systems with pension provisions at least equal to the provisions made under the Act. Senator King asked the witness if the latter did not think it highly improper for the government to discriminate against or in favor of any section or any group, such as giving a larger pension to preachers than to others; in answer to which Mr. Huggins said that he did not propose the exclusion of the group but of individual members of the group where the provision under which they fall is of wider coverage than the government plan (Ib. pp. 430-1). Such individuals would not make a contribution to the fund.

Mr. Epstein:

> " . . . Under this bill it seems that executives of $100,000 a year would still have to pay the tax. Yet no bill ever contemplates that they should get any benefit. You cannot in all fairness when you charge a pay-roll tax charge any tax on any of the pay roll except the pay roll of the insured workers. I suppose the intention was to limit it to $2,500 a year. But it is not in the bill." (Ib. p. 499)

No country taxes employees who do not get commensurate benefits (Ib. p. 501). The only important principle to consider is this: Is it right or fair for any unemployment insurance plan to establish a merit rating system some day which will relieve employers who stabilize, to get them a reduced rate?

> " . . . . Personally I do not believe any employer is entitled to any merit rating in case of unemployment insurance, because no employer is responsible either for his employment or unemployment. He is either lucky or he is not lucky. It is the social and economic forces which cause one industry to be shut down and another industry to blossom. The employer himself is not so important as to what he does; it is the social and economic forces which lie beyond him. So if a man is lucky enough to be in an industry which everybody wants, such as a public utility, let us say, it seems to me fantastic for Congress or for a State to say to them, 'Well, you are such a good boy, you are so nice, we will make it easy for you.' In other words, it is like a good insurance company saying, 'Here, you people are living happily ever after and you do not die. Let us pay you back all of your premiums. You have been nice and you have not died on us. But we will keep all the dead ones.' The insurance company would go broke of course in 2 weeks; it could not do it. The only way it can get along is by keeping the good and the bad risks. (Ib. pp. 501-2)
>
> * * * *
>
> " . . . Why should you let all your good risks escape —and you are going to deal with all of the dead ones? It is unfair, and it is against all principles of insurance." (Ib. p. 504)

Mr. Story took a different view. He asked, why should an employer who gives steady employment subsidize a competitor who does not give steady employment? (Ib. p. 518).

Unemployment is as much a hazard of industry as accident and the employer should, to a limited extent at least, bear the cost in the same way that he is bearing accident costs. (Ib. p. 518).

Mr. Folsom expressed the same view. The burden of unemployment should not be placed equally on industries with good and bad records (Ib. p. 568).

Mr. Hutzler:

> " . . . We want to give real encouragement to employers to stabilize their employment seasonally or in other ways, and those employers who would take wage-saving measures that might throw employees into this fund should be penalized by keeping the full rate while those employers who use their own establishment and manage to stabilize the employment either seasonally or by not taking drastic labor-saving measures, should have the benefit of that stabilization earlier than at the end of 5 years . . . . Those differentials can be made slowly, so that by the various State laws they do not operate too quickly and not too short an experience, but they should be made early so that as in other forms of insurance, you get the benefit of good performance, but of course as a corollary to that, provision should be put in the law giving minimum standards of benefits to the workers, so that a partially cooperating State cannot give differentials to its industries and give them a competitive disadvantage." (Ib. p. 713)

It was Senator Connally's view that every employee drawing a salary from an industry should pay. If a man drawing a salary of twenty-five thousand dollars is exempted and the man drawing fifteen dollars per week is taxed, it results in "an unjust shifting of the burden." The whole theory is that industry is going to bear its burden (Ib. pp. 719-20).

Mr. Ogburn, counsel for the American Federation of Labor, compared a street railway company with the beet canning industry. In the first the larger part of the operating cost is labor cost. The canning industry operates only a few months a year and unemployment is very large. By pooling the two the railway industry is required to contribute funds to support the canning industry (Ib. p. 772).

The legislation would never work said Mr. Elbert, unless those who continue in employment regularly contribute something to take care of the casuals. The theory is that the efficient industries which have continuous employment will contribute to some whose employment is not so favorable.

> "Senator Connally. Unless you make both the efficient industries and the efficient workers contribute to take care of the casuals, and the inefficients, who are going to be the first to lose their jobs, you are not going to accomplish anything.
>
> "Mr. Elbert. You have hit it right on the head, Senator.
>
> "Senator Connally. I am enjoying your discussion. Therefore, if you permit these big efficient corporations, like the Standard Oil and the International Harvester to segregate themselves off into watertight compartments and run their own system, you are going to destroy the whole basis of this legislation.
>
> "Mr. Elbert. I think so; yes, sir. Unemployment insurance will never work that way." (Ib. p. 834)

The administrative problem is too great to include farm hands and domestic servants (Ib. p. 841).

Mr. Kolb: The system would penalize industries maintaining relatively stable employment (Ib. p. 865).

Mr. Hooker felt that government employees should pay their share; that elimination of firms employing less than four [now eight] employees is discriminatory; that the bill selects from our total gainful population a special group and gives it unemployment benefits as a legal right while the remainder of the gainfully employed would be compelled in times of unemployment to submit to a test of need in order to obtain relief (Ib. p. 888).

Mr. Harriman, President of the United States Chamber of Commerce, felt that casuals and domestic and agricultural workers should be exempted for administrative reasons (Ib. p. 915).

Dr. Marvin, representing the American Council on Education, said that educational and charitable institutions should not be taxed, for there is practically little unemployment in this field.[1] (Ib. p. 1079)

(c). Report of the Committee on Finance of the Senate

The Committee felt it desirable to permit the states freedom of choice, in respect of the adoption of the additional credit plan, available to employers "who have regularized their employment" (Senate Report No. 628, p. 14). The number of employees covered by the tax imposed on employers (having four or more) is 25,804,000 (Ib. p. 26).

The conditions of the additional credit plan are explained (Ib. p. 50). It is noted that the employer who can qualify adds to the credit secured by the tax he actually pays the difference between such state tax actually paid and the

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1 Exemptions are available if the institution is not operated for profit [Sec. 907 (a) (7)]

maximum tax he would have had to pay if he had been contributing at the maximum state rate; the total credit not to exceed ninety percent. of the federal tax (Ib.).

(d). Statements Made in the House of Representatives

Mr. Reed said that the tax imposed by TITLE IX was not a tax but a penalty "and therefore, discriminatory as well". (Cong. Rec. Vol. 79, Pt. 6, p. 5892)

(e). Statements Made in the Senate

Senator Wagner said that "At the very hub of social security is the right to have a job". (Cong. Rec. Vol. 79, Pt. 9, p. 9283)

If this is a right on the part of the employee, the obligation to supply the job must rest on the employer. Under the provisions of our present government, which is to be protected? They could not both be equal before the law. Yet the result of the tax is to compel the employer to supply the employee with income even after the latter may have left the service years before.

The Senator pointed out the incentive to business men to diminish the volume of unemployment; that if a state law permits an employer to reduce the amount of his contribution because of his good employment record he may offset against his federal tax not only the amount of his actual payment under the state law but also the amount of the reduction which he has won; for otherwise he would not benefit in the slightest by securing such a reduction, or "additional credit". (Ib. p. 9284)

Senator George contended that Congress had selected the classes of employers which are "intimately and inescapably tied in with the employers who are taxed under Title VIII and Title IX of this bill;" that the scheme is therefore palpable and clear to his view that Congress is imposing the tax for identically the same purpose condemned by the Supreme Court in the Railroad Retirement decision—that Congress could not by compulsion make the industry set up an old-age pension system (Ib. p. 9515).

In answer to Senator George's argument that Congress is imposing a tax on one class of its citizens for the benefit of another, Senator Wagner undertook to justify the tax "because the employer gets a special benefit from the pension law . . . . because it is now a recognized fact that more security to the worker improves his efficiency . . . ." (Ib. p. 9526)

(6) The Act as Raising Funds to be paid into Private Hands

(a). Hearings before the Committee on Ways and Means of the House

Mr. Dingell inquired as to the advantage resulting from the operation of the Act under a governmental agency as compared with existing private agencies, in answer to which Mr. Hansen replied that with respect to unemployment insurance there were no private agencies in the field; that very close governmental supervision would be required over private agencies, the combined cost of which with the administrative cost of private agencies would be greater than if it

were handled directly through a governmental agency.[1] (Hearings before the Committee on Ways and Means, p. 382). Mr. Lewis interrupted to say:

> "There is a grave constitutional question as to whether even the Government of the United States could impose a tax which should be payable into private hands." (Ib. p. 383)

(b). Hearings before the Committee on Finance of the Senate

Senator Gore observed that the plan takes the purchasing power [resulting from the expenditure of the old-age pension] from the manufacturer and the merchant, which they have earned, and transfers it to the aged pensioner, which he has not earned, in order that the latter may use it to buy from the manufacturer and the merchant, whose purchasing power was taken away to start with. Miss Perkins replied that she did not think it the function of the government to take purchasing power away from one individual to give it to another; that the incidental advantage which the whole community would get, as well as the aged pensioner, was that there would arise a new location of purchasing power which would be useful to all of the community who have contributed to the fund into which the taxes going to support the plan are paid (Hearings before the Committee on Finance of the Senate, pp. 130-1).

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1 The payment by a state agency of the contributions imposed by state law into the hands of the unemployed individual under the compulsion of the Federal Act, merely follows a route through the Unemployment Trust Fund leading direct to the private individual. If the contributions were paid to a private agency for disbursement, the latter would only be substituted for the Unemployment Trust Fund provided by Section 904.

Senator Gore contended that the transfer of purchasing power may help the individual who gets the purchasing power, but it hurts the one who parts with it. He cited the effect of the processing tax resulting in taking millions of dollars out of one set of pockets and putting it into another set of pockets; that the distincion is fundamental (Ib. p. 131). He referred to Senator Long's plan to take the wealth from those who have it and give it to those who lack it, and inquired, "Now, how does that differ, in principle, from this plan?" (Ib. p. 132). Miss Perkins replied at length that the difference in degree frequently relates to principle itself; that of course if the government took all the wealth, or even a substantial part of it, away from the sources where it is created, the possibility of creating any more wealth at that place is dried up. Merely to divert a portion to a source which needs it "does not seem to be in any way a distribution of the wealth of the ordinary income-producing agency". (Ib.)

"Senator Gore. Your answer, as I understand it, is that under your plan you would not take too much of a person's income, and Senator Long would take too much of a person's income. Now what is the standard? Who is to decide how much is too much and how much is not too much?

"Secretary Perkins. The Congress of the United States. (Ib.)

* * * * *

"Senator Gore. I know the theory of private property used to be—I do not say it is now—that the man who earned the dollar honestly has a better right to it than anybody else.

"Secretary Perkins. I would not dispute that.

"Senator Gore. What I am trying to get at now is whether this legislation is not out of line with that

once established principle. . . . . Now who is to decide? Is it the people who want this wealth given to those who haven't got it? Has a citizen no guarantee, under our constitutional system, that that thing cannot be done? Do you think he has? Isn't this plan, and the Long plan, in effect to take private property for private use?

"Senator Couzens. Isn't that a question for the Supreme Court to decide?

"Secretary Perkins. It is not for me to decide. Thank you, Senator." (Ib. p. 133)

(c). Statements Made in the House of Representatives

Mr. Knutson replied that Congress could impose taxes only to provide revenue for the government; that the tax (under TITLE VIII) on its face is not for the purpose of providing revenue for federal purposes, but it is simply an enforced contribution for the benefit of a certain class of persons (Cong. Rec. Vol. 79, Pt. 5, p. 5543).

Mr. Scott of California observed that the only way Congress seemed to be able to accomplish the purpose of the bill was to try to take from those who have and give to those who have not (Ib. p. 5477).

(d). Statements Made in the Senate

Senator Harrison said that almost every state commission investigating the subject urged some form of unemployment insurance uniformly recognizing that part or all the cost should be borne by employers in industry and that reserves should be built up in good times to help in providing for the welfare of those unfortunates cut off from regular work by seasonal unemployment or that resulting from the

many other causes found even in normal times (Cong. Rec. Vol. 79, Pt. 9, p. 9270); that it had been found actuarially possible, and the bill provides a method, for those in industry to contribute from year to year a tax covered into the Treasury of the United States sufficient to bear the costs of an old-age annuity for those in industry (Ib. p. 9268).

Senator George spoke in support of an amendment (Ib. p. 9510) offered by Senator Clark which undertook to preserve pension plans set up by private idustry, providing for approval by the Board of applications from employers who prefer to operate private annuity plans in lieu of the plan set up by the bill.

Senator George said there was grave doubt of the constitutionality of the bill as it stands; that he did not believe that any lawyer of experience would assert that the bill is free from constitutional question.

> " . . . . I do not wish to expand the constitutional argument, because the Senate is not in receptive mood, but the bill undertakes to impose a tax upon specific employers. The beneficiaries of the tax are a special class, it is disclosed in the hearings, and it is disclosed in the suggestion of the Secretary of the Treasury at one time for an alteration in the tax rate itself, showing that the only purpose of the bill is to set up a system of old-age annuity and unemployment insurance by the use of the taxing power, and by the creation of the annuity system and the old-age employment insurance system. (Ib. p. 9514)
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> " . . . . I contend further that when the scheme which has been devised is so tied in with the taxing provision as to disclose but one purpose, and that is the purpose of using the general taxing power for the purpose

of providing this system only for the beneficiaries who fall within the classification of the employees of the taxed employers, we shall have a legislative act, if the bill shall be passed, which any reasonable lawyer of experience will be bound to say is subject to serious question." (Ib. pp. 9515-16)

(7) The Act as an Unreasonable and Arbitrary Enactment in Imposing an Unequal Tax

(a). Hearings before the Committee on Ways and Means of the House

Mr. Cooper was interested to ascertain how the principle of additional credits contributed toward uniformity as to which Dr. Witte admitted that it was to a slight extent a deviation from that principle. Under the plant-reserve system it will not be very great because the number of plants that will build up a fifteen per cent. reserve is likely to be very small. It is a crude system that levies the same rate of contribution on the bank as on the contractor. The risk is of a different sort. Mr. Cooper replied that if a large industry had different branches in different states and one state allowed preferential treatment which was denied in the other, the principle of uniformity which is sought to be accomplished by the imposition of a federal tax is shaken (Hearings before the Committee on Ways and Means, p. 146).

Mr. Hutzler referred to the differential in workmen's compensation laws. If the experience of an industry was good, it got a lower rate. Mr. Treadway asked, then if employees of stores having less hazardous employment than the employees of a mill, if there are less accidents in the former, or if the health of its employees is such that they can continue working longer without a vacation, is that a differential? In

answer to which Mr. Hutzler said "we are thinking just in the unemployment end rather than in the health end" (Ib. p. 775). This subject is further covered under the subject of Denial of Due Process of Law (supra, p. 138).

(b). Hearings before the Committee on Finance of the Senate

For this subject see The Act as a Denial of Due Process of Law, supra, p. 138.

(c). Statements Made in the Senate

Senator George called attention to the fact that the tax on employers to support the system is levied at a uniform rate without regard to the hazards of industry.

> " . . . . The mining company which sends its men down to the bowels of the earth, where fatalities often occur, has to bear the same burden of tax as the industry in which retirement, accidents, and death rarely and seldom occur. That is another feature involving the constitutionality of the measure, but I do not intend to do more than say that no responsible lawyer who has been in a courthouse three times would dare say that the provisions of this bill which have been discussed are not subject to serious question." (Cong. Rec. Vol. 79, Pt. 9, p. 9518)

Senator King observed that (under TITLE VIII) when standing alone, there is a discrimination in its classification apparently in violation of the Fifth amendment. He inquired:

> " . . . . Why should stenographers, clerks, janitors, and so forth, doing the same class of work, be exempted from a tax when they are working for religious, chari-

table, scientific, or educational institutions and subject to the tax when working for other institutions or business?" (Ib. p. 9536)

Senator Tydings observed that if it is the general policy of the nation to take people off the work list when they reach sixty-five there is no reason why the federal government or the Presbyterian Church or anybody else should have an exemption, unless every other concern which is already providing its own retirement agency should have an equal right, particularly when it is maintaining a better system or pays more than is proposed to be paid by the federal government (Ib. p. 9528).

Senator Barkley said that Congress could not tax the Baldwin Locomotive Works in order to pension somebody who does not work for that company; so that whenever it is decided to pension everybody who is over sixty-five years of age a general tax must be levied on everybody who is subject to the tax (Ib. p. 9528).

Referring to the decision in the Railroad Retirement Case, and to the argument that that case threatened the bill with extinction under the due process clause, since it held that the pooled funds arrangement violated the Fifth Amendment, Senator Wagner declared that the Supreme Court was "tremendously influenced" by the specific provisions of the pooling system under fire, particularly in its application to past periods of service (Ib. pp. 9287-8).

(8) Retention by Congress of the Power to Alter or Repeal the Act

(a). Hearings before the Committee on Ways and Means of the House

It is not left to inference that Congress demands the right to amend or repeal the Social Security Act without incurring any liability for state funds or otherwise. The state law is required to provide for legislative amendment or repeal before it can be certified by the Board [Sec. 903 (a) (6)]. Mr. Witte:

> " . . . We wish to make it doubly certain that if the Congress desires to insert further conditions at a later date, it may do so, if that should become necessary." (Hearings before the Committee on Ways and Means, p. 138)

III

The Principle of Reasonable Relationship

What reasonable relationship to the taxing power of Congress can this measure be said to sustain? It is not intended that one dollar of the payroll taxes shall be used for general purposes of government. In *Magnano v. Hamilton,* 292 U. S. 40 (78 L. ed. 1109), the Supreme Court said that the requirement that a tax be for a public purpose "has regard to the use which is to be made of the revenue derived from the tax, ... " [43 (1113)]. The entire tax resulting from the Child Labor Tax Act, which is part of the revenue act of 1919 (40 Stat. 1057, 1138), finds its way to the treasury to be disbursed for the purposes of government; yet from the opinion of the Supreme Court we may well infer

the view that the provisions of the Act were not naturally and reasonably adapted to the collection of the tax, but "solely to the achievement of some other purpose plainly within state power." [259 U. S. 20, 43 (66 L. ed. 817, 822)]. Likewise in the Future Trading Act (42 Stat. 187) the tax went into the treasury. In *Hill v. Wallace,* 259 U. S. 44 (66 L. ed. 822), the court said that the manifest purpose of the Act was to compel boards of trade to comply with regulations

> "many of which can have no relevancy to the collection of the tax at all . . . . The Act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. . . . " [66-7 (829)]

In *Linder v. United States,* 268 U. S. 5 (69 L. ed. 819), the court was considering the Harrison Narcotic Act (38 Stat. 785) as amended by Section 1006 of the general revenue act of 1919 (40 Stat. 1057, 1130). There was no suggestion in the Act as to the use of the funds arising from the tax. The original Act provided by Section 7 that all internal revenue tax laws should be extended and made applicable to the special taxes imposed by the Act, so far as applicable to and not inconsistent with the provisions of the Act. Under the claimed authority of the amendment contained in the revenue act of 1919, the government indicted Dr. Linder on the charge of giving a known addict four tablets containing morphine with the expectation that she would administer them to herself in divided doses, for the sole purpose of relieving conditions incident to addiction and keeping herself comfortable. The Court declared such a claimed construction of the act was

beyond the power of Congress to authorize; that the law was essentially a revenue measure "and its provisions must be reasonably applied with the primary view of enforcing the special tax. . . ." [22 (825)]

Other cases which have reached the Supreme Court in which that Court considered reasonable relationship of the act to the constitutional power under which the act is claimed to arise are *Truman H. Newberry et al. v. United States of America*, 256 U. S. 232, 258 (65 L. ed. 913, 921-2), in which the Court declared invalid the act of Congress regulating primary elections for United States senators (37 Stat. 25) as not being reasonably related to the exercise by Congress of its powers derived under Article 1, Section 4 of the Constitution; *Damselle Howard, etc. v. Illinois Central Railroad Company, etc.*, 207 U. S. 463, 502-3 (52 L. ed. 297, 310-11), involving the first employers' liability act which the Court held extended to matters within the local control of the states; *Joseph Keller, etc. v. United States*, 213 U. S. 138, 144 (53 L. ed. 737, 739), involving the prosecution against a citizen who within a period of three years after the arrival of an alien harbored the latter in the pursuit of her degraded life; and the *Child Labor Case*, 247 U. S. 251, 275-6 (62 L. ed. 1101,1107), forbidding the shipment in interstate commerce of goods made in a mill employing child labor. In all these cases the Court declared the end sought by Congress not reasonably related to the constitutional power on which the respective acts under consideration were claimed to rest.

If the acts of Congress involved in all the foregoing cases are beyond the power of Congress, it is difficult to believe that the Court will now so extend the power of Congress under the taxing clause as to permit it to compel the states through the direct penalties contained in the Federal

Act, to engage in a system of unemployment, which Congress acknowledges through the proposed tax device it is unable to put into effect directly.

IV

Inseparability of the Federal Act

The Federal Act contains Section 1103 to the effect that if a provision is held invalid the remainder of the Act shall not be affected thereby. This declaration provides a rule which may aid in determining the legislative intent, "but is not an inexorable command." *Railroad Retirement Board v. Alton*, 295 U. S. 330, 362 (79 L. ed. 1468, 1482). But this Court cannot rewrite the statute and give it an effect altogether different from that sought by the measure viewed as a whole [Ib. 362 (1483)]. To the same effect see *Carter v. Carter Coal Company*, 298 U. S. 238, 312 (80 L. ed. 1160, 1189).[1]

The question to be determined by this Court is, therefore, would Congress have been satisfied to enact what remains of the statute after eliminating the invalid parts?

From the history of the Act it is obvious that Congress was not seeking taxes for the Treasury; it was providing a plan for unemployment. Without the plan the tax would not have been imposed. With the plan the entire Act falls.

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[1] Constant use of the separability clause may defeat its purpose. See Dissection of Statutes by Noel T. Dowling, American Bar Association Journal, Vol. 18, page 298.

V.

Grants Contained in Prior Acts of Congress Furnish no Precedent for TITLE III of the Federal Act.

Referring again to the brief of the Government in the case of *Davis v. Boston & Maine Railroad*, we note that dependence is placed on the history of prior grants by the United States in varied fields of federal and state action (p. 53), and support is thus claimed for the validity of the Federal Act. In the brief of the Attorney General (Cong. Rec. Vol. 79, Pt. 5, p. 5784), reference is made to several classes of grants. In the Committee hearings mention is made of the Morrill Act (12 Stat. 503) which is pressed as a precedent for the grants contained in the Federal Act. There is slight similarity between the two. The Morrill Act grants to each state thirty thousand acres of land (or scrip in lieu thereof) for each senator and representative in Congress on the following conditions:

(a) The sales' price of the lands shall be devoted entirely to the purposes of the grant, the state paying all administration and other costs of sales.

(b) All monies derived from sale of the lands shall be invested in bonds of the United States, or other states, or other safe stocks, yielding not less than five percentum on the sales' value.

(c) The monies so invested shall constitute a perpetual fund for the endowment, support and maintenance of at least one college where the leading object shall be to teach branches of learning related to agriculture and the mechanical arts, including military tactics; in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

(d) The annual interest shall be regularly applied without diminution, to the foregoing purposes, except that ten percentum of the capital may be expended for the purchase of lands for sites or experimental farms.

(e) No portion of the principal or interest shall be applied to the purchase, erection or repair of buildings.

(f) Any state accepting this grant shall provide within five years at least one college, or the grant shall cease and the state shall reimburse the United States the amount theretofore received by the state from the sale of such lands.

(g) Each state shall make an annual report regarding the progress of each college, one copy of which shall be sent to the secretary of the interior and one copy to each such other college.

(h) No state in rebellion or insurrection shall be entitled to the grant.

(i) No state shall be entitled to the grant unless it accept the same within two years after the approval of the act.

(j) The governments of the several states accepting the grant of scrip shall report annually to Congress all sales made of such scrip, the amount received for the same, and what appropriation has been made of the proceeds.

No conditions imposed under any grants heretofore made have approximated the proportion of TITLE III and TITLE IX. It is true that many grants have stipulated conditions, both prior and subsequent to acceptance; but it is likewise true that under *Frothingham v. Mellon,* 262 U. S. 447 (67 L. ed. 1078) any such grant could have been attacked with great difficulty, if at all.

The conditions and requirements contained in the many grants heretofore made may be grouped in the following subjects. These concern:

(1) Lighthouses, Beacons, etc.
(2) Land Grants for Canals, Navigation, Improvement of Water Courses
(3) Land Grants for Schools and Universities
(4) Land Grants for Railroads
(5) Land Grants for Public Road
(6) Land Grants; Miscellaneous
(7) Grant of Use of Vessel
(8) Funds, Grants of
    (a) Diseases among Cattle
    (b) Experiment Stations and Extension Work by Agricultural Colleges
    (c) Vocational Education
    (d) Vocational Rehabilitation
    (e) Public Roads
    (f) Disabled Soldiers
    (g) Forest Fire Protection
    (h) To Reimburse for Losses from Floods
    (i) Maternity and Infancy Welfare
    (j) Flood Control
    (k) Federal Emergency Relief
    (l) Study of Agriculture

We undertake to set out without duplication the conditions attached to prior grants:

(1) *Lighthouses, Beacons, etc.*

The states to cede within one year lands on which are located lighthouses to be maintained by the United States (1 Stat. 53).

(2) *Land Grants for Canals, Navigation, Improvement of Water Courses*

(a) Proceeds of land grant to be used for the construction of canals (5 Stat. 57).

(b) Tolls to be collected not to be in excess of amount necessary for repairs and maintenance and to be expended exclusively on canals. (Ib.)

(c) Annual report to be made of rate and amount of tolls. (Ib.)

(d) Dimensions of canal fixed (10 Stat. 35).

(e) Canal to be a public highway. (Ib.)

(f) Canal to be begun within three years and completed within ten years, or state shall be liable for the lands sold. (Ib.)

(g) Canal to be free of toll to the United States. (Ib.)

(h) Accounts of all expenditures of construction and operation to be kept. (Ib.)

(i) Land sold to be limited to one section per township (15 Stat. 169).

(j) No selection to be made from mineral lands. (Ib.)

(k) Lock and dam to be free from toll, to be constructed under the direction of the United States Department of Engineers, and to be completed within two years; otherwise the land reverts. (Ib.)

(3) *Land Grants for Schools and Universities*

(a) To be sold only with the consent of the inhabitants of the district for which the land was reserved (4 Stat. 237).

(b) Each district to be entitled only to that amount accruing from the sale of land belonging to the district. (Ib.)

(c) Legislature to accept grant within one year (2 Stat. 424).

(d) State to release right to certain tract which had theretofore been granted [to Ohio]. (Ib.)

(e) To be sold at public auction for use and support of university (21 Stat. 326).

(f) Funds derived to be invested in United States bonds and deposited in the Treasury of the United States. (Ib.)

(g) Sale of land for any one year limited to one-tenth of the land granted. (Ib.)

(h) No money to be spent for buildings or salaries until fund reaches $50,000 when interest may be spent; excess of $100,000 may be spent. (Ib.)

(i) State to collect no rent for land granted for college purposes (44 Stat. 1296).

(4) *Land Grants for Railroads*

(a) Land selected to be within twenty miles of road (12 Stat. 772).

(b) Land to be used exclusively for the construction of railroad. (Ib.)

(c) Railroad to be free from toll to United States. (Ib.)

(d) Land to be sold when and as construction proceeds. (Ib.)

(e) If road not completed within ten years land reverts to the United States. (Ib.)

(f) Road to be of certain width and grade (12 Stat. 797).

(5) *Land Grants for Public Road*

(a) Road to be completed within four years (3 Stat. 727).

(b) Land not to be sold for less than $1.25 per acre. (Ib.)

(c) Road to be free for use by the United States (4 Stat. 242).

(6) *Land Grants; Miscellaneous*

(a) Forest lands ceded to Wisconsin for forestry purposes only; if not so used lands revert (37 Stat. 324).

(b) Lands for fish hatchery to be used by the state under plans to be approved by Secretary of War (39 Stat. 35).

(c) For game refuge—to be used solely as authorized; otherwise lands revert (42 Stat. 828).

(d) For park purposes—to be used solely as authorized; otherwise lands revert (44 Stat. 591).

(e) Lands of the United States may be included in state irrigation district, map of district to be submitted and sufficiency of water supply demonstrated; costs of irrigation to be borne by private lands (39 Stat. 506).

(7) *Grant of Use of Vessel*

Use of vessel permitted to a state for use of a school which is maintained for instruction in navigation, etc.; the

vessel to be returned when the school is discontinued (18 Stat. 121).

(8) *Funds, Grants of*

(*a*) *Diseases Among Cattle*

When the plans of the commissioner of agriculture for suppression of diseases among cattle shall be accepted by any state, the commissioner may spend money therein for this purpose (23 Stat. 31).

(*b*) *Experiment Stations and Extension Work by Agricultural Colleges*

1. Only one-fifth of annual appropriation to be spent on buildings (24 Stat. 440).

2. Reports to be made to state government and commissioner of agriculture. (Ib.)

3. State to appropriate a sum equal to that expended by the United States (38 Stat. 372).

4. Reports to be made to the Secretary of Agriculture. (Ib.)

5. Plans for the work to be carried on under the act to be submitted and approved by the Secretary of Agriculture. (Ib.)

(*c*) *Vocational Education*

Plans to be approved by Federal Board (39 Stat. 929).

(*d*) *Vocational Rehabilitation*

No monies to be used for purchase, erection or repair of any building or equipment (41 Stat. 735).

(*e*) *Public Roads*

To be kept in repair by the state (39 Stat. 355).

(*f*) *Disabled Soldiers*

$100 per annum per person appropriated to states which have established homes (25 Stat. 450).

(*g*) *Forest Fire Protection*

1. State to pass a forest fire protection law (36 Stat. 961).

2. State to appropriate equal amount of money for a like purpose. (Ib.)

3. Title to revert to the state when the United States is reimbursed for purchase of lands (1935 Pamphlet, ... Stat. 963).

4. State to provide for state forester. (Ib.)

5. State to pay future costs of administering and managing lands. (Ib.)

6. State to pay United States one-half of gross proceeds covered by agreement, to be credited on purchase price to state. (Ib.)

(*h*) *To Reimburse for Losses from Floods.*

1. To provide bridges swept away by floods (46 Stat. 84).

2. To be used only on highways in the federal-aid highway system. (Ib.)

3. State to show that either before or after the approval of the act it has expended a like sum for the same purpose. (Ib.)

(*i*) *Maternity and Infancy Welfare*

1. Money is not to be used for payment of maternity or infancy pensions (42 Stat. 224).

2. State to create agency to cooperate with the federal agency. (Ib.)

(*j*) *Flood Control*

1. States to maintain flood works after completion (45 Stat. 534).

2. To accept lands turned over to the States. (Ib.)

3. To provide without cost to the United States rights of way for levee foundations. (Ib.)

4. To contribute one-third of cost of work. (Ib.)

(*k*) *Federal Emergency Relief*

1. State to certify necessity for funds (47 Stat. 709).

2. Monies used on public highways to be repaid by state within ten years. (Ib.)

(*l*) *Study of Agriculture*

To provide for research into basic laws of agriculture; the state to provide an amount equal to that of the United States (1935 Pamphlet, ... Stat. 436).

Let us compare all the foregoing conditions with the equirements of Sections 302 (a) and 303 (a) and (b), and ith Sections 903, 904 and 907, an analysis of which is set out t length on pages 9-13 herein. The result is obvious. ast history provides no precedent for the conditions im- osed by the Federal Act.

CONCLUSION

1. TITLES III and IX are not a valid exercise of he taxing powers of Congress.

2. The taxing powers sought to be exercised are ot separable from the provisions relating to credits and nemployment and to the requirements imposed on the tates.

3. The appropriation of $49,000,000 is not intended o correspond with the total tax imposed by TITLE IX. is intended to result from and equal the amount of the x after the credit is given, the cost of administration of ate laws being estimated at ten per cent. of the total state and federal) tax collected.

4. While Congress may have lately spent billions dollars for relief, which is the primary burden and duty the states, the constitutionality of which is difficult if ot impossible to raise in the courts, the fact that Con- ress has spent this sum cannot now be used to arm Con- ress with the power to impose invalid burdens on the ates in order to compel the latter to refill the federal easury and to encourage the states to assume their oper burdens in the future.

The Constitution marks the boundaries between the United States and the states. Congress lacks the power to discipline the latter.

5. It is undeniable that the states were compelled to comply with the demands of Congress. The entire history of the Federal Act shows this plan and intention. That forty-two states have submitted is convincing of its effectiveness.

6. No grant by Congress is justified if its non-acceptance results in a penalty. If the states do not comply their citizens are compelled to supply millions of dollars to be used for the administration of agencies in the states that submit.

7. The system denies due process of law to employers of eight or more by requiring the states to impose on this group a tax for the purpose of paying benefits to individuals who are unemployed.

Respectfully submitted,

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Birmingham, Alabama,
April 3, 1937.

I hereby certify that I have this day forwarded to Hon. Stanley Reed, Solicitor General, copy of the foregoing brief and of Appendix A thereto.

WM. LOGAN MARTIN,
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